

# **The Straw that Broke the Camel's Back? Grand Staircase-Escalante National Monument Antiquates the Antiquities Act**

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*The public lands of the United States have always provided the arena in which we Americans have struggled to fulfill our dreams. Even today dreams of wealth, adventure, and escape are still being acted out on these far flung lands. These lands and the dreams—fulfilled and unfulfilled—which they foster are a part of our national destiny. They belong to all Americans.*<sup>1</sup>

## **I. INTRODUCTION**

For some Americans, public lands are majestic territories for exploration, recreation, preservation, or study. Others depend on public lands as a source of income and livelihood. And while a number of Americans lack awareness regarding the opportunities to explore their public lands, all Americans attain benefits from these common properties. Public land affect all Americans. Because of the importance of these lands, heated debates inevitably arise regarding their use or nonuse.

The United States Constitution grants to Congress the “[p]ower to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States.”<sup>2</sup> Accordingly, Congress, the body representing the populace, determines the various uses of our public lands. While the Constitution purportedly bestows upon Congress *sole* discretion to manage public lands, the congressionally-enacted Antiquities Act conveys some of this power to the president, effectively giving rise to a *concurrent* power with Congress to govern public lands.

On September 18, 1996, President William Jefferson Clinton issued Proclamation 6920<sup>3</sup> under the expansive powers granted to the president by the Antiquities Act<sup>4</sup> (“the Act”) establishing, in the State of Utah, the Grand

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<sup>1</sup> 145 CONG. REC. S3460 (daily ed. Mar. 25, 1999) (statement of Sen. Murkowski) (quoting Sen. Jackson).

<sup>2</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>3</sup> Proclamation No. 6920, 3 C.F.R. 64 (1997)

<sup>4</sup> The Antiquities Act (entitled “Act of June 18, 1906,” but popularly known as the “Antiquities Act”), passed in 1906, is codified, in part, at 16 U.S.C. § 431 (2000), and states:

Staircase-Escalante National Monument (“the Monument” or “Grand Staircase”).<sup>5</sup> The Monument, the creation of which resulted in a great deal of disapproval from local Utahns, encompasses 1.7 million acres of federally owned lands, making it *the* largest national monument in the continental United States.<sup>6</sup>

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The President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

The language of the Act is rather brief and very broad. Two main sections loosely direct and limit the president in his powers. First, a potential monument must include “historic landmarks, historic and prehistoric structures” or “objects of historic or scientific interest.” Second, the land area a monument may encompass is only limited by the language “shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.” Since 1906, most presidents have invoked the Antiquities Act to proclaim national monuments; many presidents have taken full advantage of the “wild card” language “and other objects of historic or scientific interest” to monumentalize land that does not contain specific historic or prehistoric objects or landmarks. Many opponents of national monuments frequently cite the “shall be confined to the smallest area compatible” language, arguing that a president has designated too much land as a monument, thereby violating the plain language of the Act and invalidating the monument proclamation. Such arguments, however, have never been successful in challenging monument designation, and to date, no land area limitation has ever been imposed judicially or legislatively. It is important to note that national monuments can only be created “upon lands owned or controlled by the [federal] Government”; thus, their ownership is never changed, but rather their use is restricted.

<sup>5</sup> Janice Fried, *The Grand Staircase-Escalante National Monument: A Case Study in Western Land Management*, 17 VA. ENVTL. L.J. 477, 477 (1998). The Grand Staircase region of Utah began its formation 250 million year ago when landmasses collided, lifting the Colorado Plateau. Ed Vulliamy, *Blazing Battle to Keep the West Wild: Ed Vulliamy on the Race by Utah Oilmen to Strike It Rich Before Al Gore Puts the Wilderness Off Limits*, OBSERVER (London), Oct. 12, 1997, at 20. The result of the collision was an array of rock, natural bridges, vast canyons, and three “stairs,” each 1000 feet in elevation. *Id.* The Grand Staircase region contains five different life zones, ranging from Sonoran desert to coniferous forests. See M. Lee Allison, *The Geography and Geology*, in VISIONS OF THE GRAND STAIRCASE-ESCALANTE: EXAMINING UTAH’S NEWEST NATIONAL MONUMENT 3, 6 (Robert B. Keiter et al. eds., 1998) [hereinafter VISIONS] (revealing diagram cross-section of Grand Staircase that depicts its staircase-like formation); see also Bureau of Land Mgmt.—Grand Staircase-Escalante Nat’l Monument, *Visitor Information*, at [http://www.ut.blm.gov/monument/Visitor\\_Information/visitor\\_information.html](http://www.ut.blm.gov/monument/Visitor_Information/visitor_information.html) (last updated July 23, 2001) [hereinafter *Visitor Information*]. In his 1880 *Report of the Geology of the High Plateaus of Utah*, geologist Clarence Dutton recorded “what he termed a grand stairway of sequential cliffs and terraces.” *Visitor Information*, *supra*. The name “Escalante” comes from the Escalante River, which was named after Father Silvestre Velez de Escalante, a Spanish explorer and priest who explored the area in the late 1800s. *Id.*

<sup>6</sup> Fried, *supra* note 5, at 477–78. Compared with other Utah national parks and recreation areas, Grand Staircase is fifty-two times larger than Bryce Canyon National Park, thirteen times larger than Zion National Park, and one-third larger than the entire Glen Canyon National

Grand Staircase encompasses 2700 square miles of two large Utah counties and equals the size of Delaware and Rhode Island combined.<sup>7</sup> Stated differently, Grand Staircase is equivalent to a one-and-a-half mile wide tract of land stretching from San Francisco to New York City.<sup>8</sup> The Monument includes the Grand Staircase, the Escalante National Bridge and Canyons, and the Kaiparowits Plateau,<sup>9</sup> all of which are federally owned and controlled lands.<sup>10</sup> Utah, already the home of a plethora of national parks, recreation areas, and monuments, surrounds Grand Staircase with Bryce Canyon National Park, Dixie National Forest, Box Death Hollow Wilderness, Capitol Reef National Park, and Glen Canyon National Recreation Area.<sup>11</sup>

While President Clinton's proclamation was termed by many disgruntled Utahns as "the mother of all land grabs,"<sup>12</sup> his expansive use of the Antiquities

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Recreation Area, which includes 2000 miles of shoreline along Lake Powell. *The National Monument Fairness Act of 2001: Hearing on H.R. 2114 Before the House Comm. on Res., Subcomm. on Nat. Parks, Recreation, and Pub. Lands*, 107th Cong. 50-55 (2001) (statement of Michael E. Noel, Chairman, Kane County Resource Development Committee), available at <http://resourcescommittee.house.gov/107cong/parks/2001july17/noel.htm> (last visited Feb. 17, 2003) [hereinafter Statement of Michael E. Noel].

<sup>7</sup> Matthew W. Harrison, *Legislative Delegation and Presidential Authority: The Antiquities Act and the Grand Staircase-Escalante National Monument—A Call for a New Judicial Examination*, 13 J. ENVTL. L. & LITIG. 409, 410 (1998); see also Statement of Michael E. Noel, *supra* note 6 (stating that Kane County, Utah, much of which is made up of Grand Staircase National Monument, is larger than the state of Connecticut, but unlike Connecticut, 90 percent of its land is controlled by the federal government).

<sup>8</sup> Statement of Michael E. Noel, *supra* note 6.

<sup>9</sup> The Kaiparowits Plateau is a wedge-shaped block of mesas and canyons that stands tall among the surrounding landscape. *Visitor Information*, *supra* note 5. "Kaiparowits" is a Paiute term meaning "Big Mountain's Little Brother." *Id.*

<sup>10</sup> Fried, *supra* note 5, at 477.

<sup>11</sup> See Fried, *supra* note 5, at 477.

<sup>12</sup> 143 CONG. REC. S2563 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch). Utah Governor Mike Leavitt declared President Clinton's action "[o]ne of the greatest abuses of executive power in (U.S.) history." Tom Kenworthy, *Utah Gov to Request Monument*, USA TODAY, Jan. 30, 2002, at A5. The language of the Antiquities Act does not require the president to provide any notice to local governments or residents prior to making a monument declaration. See 16 U.S.C. § 431 (2000). Infuriated by the powers the Act provided to President Clinton, Senator Hatch reported: "There has been no consultation; no hearings; no town meetings; no TV or radio discussion shows; no input from federal land managers on the ground; no maps; no boundaries; no nothing." *Utah Delegation Blasts Clinton Move on Monument*, CONGRESS DAILY/A.M., Sept. 19, 1996, 1996 WL 11367575. In a speech before the U.S. Senate, Senator Hatch claimed: "Like the attack on Pearl Harbor, this massive proclamation came completely without notice to the public." Lee Davidson, *Utahns Introduce Bills Requiring Congress to OK Monuments*, DESERET NEWS (Salt Lake City), Mar. 20, 1997, at B2. Senator Hatch also stated: "In all my 20 years in the U.S. Senate, I have never seen a clearer example of the arrogance of federal power." Laurie Sullivan Maddox, *Taking Swipes at Clinton, Utahns Vow to Fight Back*, SALT LAKE TRIB., Sept. 19, 1996, at A5. Even Utah

Act was certainly not unprecedented. Since its enactment in 1906, presidents have used the Act to create 123 national monuments encompassing 68,000,000 acres of federally controlled lands.<sup>13</sup> Some of the most notable monuments include the Grand Canyon, created by Theodore Roosevelt,<sup>14</sup> Jackson Hole National Monument, created by Franklin D. Roosevelt,<sup>15</sup> and, arguably most remarkable, the fifteen national monuments created *simultaneously* in the Alaskan wilderness by Jimmy Carter.<sup>16</sup>

The virtual absence of local or congressional input and approval of a president's monument designation often generates discord among interested parties. Yet, under the terms of the Act, the president is not required to consult with local and state authorities. Neither is the president obligated to seek congressional advice and consent prior to declaring lands national monuments. Regardless of the Act's current requirements, the potentially detrimental effects of a monument designation frequently cause state and local residents and their legislators, who have valid interests in the lands, to clamor for reform.<sup>17</sup>

The Antiquities Act held a legitimate purpose at one time, but it is now severely antiquated and must be dramatically amended or abolished. While it was

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Democratic Representative Bill Orton, clearly walking a fine line between the acts of his party's president and the frustrations of his constituents referred to President Clinton's action as a "monumental blunder—pun intended." *Id.* While Grand Staircase certainly picked up a few votes of environmentalists for President Clinton in the ensuing presidential election, the story for Representative Orton was quite different; as Utah's only Democratic representative in Congress, Orton was voted out of office in the congressional election that followed just forty-eight days after the designation. See D.F. Oliveria, *Clinton Land Grab Concerns Us All: Pure Arrogance Public Lands Too Important for One Man to Decide*, SPOKESMAN REV. (Spokane, Wash.), Nov. 8, 1996, at B6.

<sup>13</sup> Fried, *supra* note 5, at 478.

<sup>14</sup> Harrison, *supra* note 7, at 416–17.

<sup>15</sup> *Id.* at 419–20.

<sup>16</sup> *Id.* at 429. To date, President Carter's December 1, 1978 establishment of fifteen national monuments over fifty-six million acres of Alaskan land represents the single largest withdrawal of federal lands under the Act. *Id.*

<sup>17</sup> Because monument lands are wholly owned by the federal government, residents and state and local governments generally do not have legal interests in the land; rather, federal lands are often leased to ranchers and developers who use the land, creating jobs, boosting the local economy, and paying royalties to both the state and federal governments. See *infra* Part VI (discussing economic issues); see also Daniel Glick & Sharon Begley, *Monument in the Red Rock*, NEWSWEEK, Sept. 30, 1996, at 61. Residents of Kanab, Utah, a small town bordering the Monument, shut down their businesses to protest the declaration of Grand Staircase. Furious that President Clinton could, and did make such a decision without any local input or notice, people of this rural town released black balloons and flew their flags at half mast; area restaurants advertised for "Clinton Burgers: 100 Percent Chicken." *Id.* The declaration of the Monument greatly hinders mining potential in the area as well as cattle ranching and logging on federal lands, economic activities in which locals have historically partaken. See *infra* Part VI.B.

created to allow the president to protect historical and cultural objects in times of emergency, the Act has bred unintended powers, essentially allowing the president to single-handedly bypass congressional land management policies and initiatives and to determine the fate of public lands throughout America. This inadvertent reality impacts all Americans. Although Grand Staircase-Escalante National Monument is not the only controversial national monument created in American history, and dissension ensues even today over monument proposals, Grand Staircase is an appropriate vehicle to analyze the havoc the Antiquities Act has inflicted not just upon Utahns, but upon the American system of land management as a whole.

Part II studies the legislative history and the purposes of the Antiquities Act. In Part III, this note analyzes the history of presidential proclamations and assesses to what degree courts are willing to scrutinize presidential decisions made pursuant to the Antiquities Act. Part IV discusses the methods and the extent of the Act's use. In doing so, Part IV reveals litigation and legislative challenges occurring since the Antiquities Act's inception.

Part V focuses on congressional action concerning protection of the Grand Staircase region prior to the 1996 proclamation. In addition, Part V critiques President Clinton's motives in invoking the Antiquities Act and in creating a national monument in Utah, thereby disregarding Congress's efforts. Part VI assesses problems arising since the Grand Staircase's creation, particularly the destructive economic effects. Part VII discusses an ironic proposal currently under President George W. Bush's consideration, whereby he would designate an additional monument in Utah. Part VII also explores proposed legislation to amend the Antiquities Act and analyzes elements of each bill likely to have the greatest effect on dismantling the overbearing powers available under the Antiquities Act. Finally, Part VII argues that it is time to restore public land management to the hands of the *public*, so that all Americans have a voice regarding how *their* lands are used.

## II. THE HISTORY OF THE ANTIQUITIES ACT

The original legislative purpose of the Antiquities Act was to preserve objects of antiquity.<sup>18</sup> The Act came at a time when statutes, such as the Homestead Act, allowed private settlers to claim certain unreserved federal

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<sup>18</sup> Ann E. Halden, *The Grand Staircase-Escalante National Monument and the Antiquities Act*, 8 FORDHAM ENVTL. L.J. 713, 715–16 (1997); see also *Utah Ass'n. of Counties v. Clinton*, Nos. 2:97 CV 479, 492, 863, 1999 U.S. Dist. LEXIS 15852, at \*9 n.4 (D. Utah Aug. 11, 1999), *rev'd*, 255 F.3d 1246 (10th Cir. 2001) (“[The phrase ‘objects of antiquity,’ while not in § 431 but found in § 433, has commonly been interpreted to include such items as paleontological and archaeological artifacts.”). Most courts have been unable to come to a common conclusion as to the exact meaning of the phrase.

lands.<sup>19</sup> Archeological organizations began lobbying the government near the end of the Nineteenth Century and the beginning of the Twentieth Century for legislation to protect aboriginal antiquities located on federally owned lands, most of which were in the undeveloped and sparsely inhabited western and southwestern United States.<sup>20</sup> In 1899, the American Association for the Advancement of Science established the Committee on the Protection and Preservation of Objects of Archeological Interest.<sup>21</sup> The committee's purpose was to lobby Congress for drafting a bill to protect objects of antiquity.<sup>22</sup> The committee felt that because objects of ancient American Indian ruins were being lost, destroyed, or exploited as the United States explored and developed westward, action needed to be taken to protect these objects.<sup>23</sup> At the same time, the Department of the Interior began lobbying for a proposed bill to include protection for scientific and scenic areas as well.<sup>24</sup>

In 1905, the American Anthropological Association appointed archeologist Edgar Lee Hewett as secretary of the committee responsible for drafting legislation regarding antiquities.<sup>25</sup> Under Hewett's direction the proposed bill expanded the authority of the president to declare monuments beyond objects of

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<sup>19</sup> Joseph M. Feller, *Recent Developments in Public Land Law: National Monuments, National Forest Roadless Areas, and BLM Rangeland Management*, in A.L.I.-A.B.A. COURSE OF STUDY, Course No. SF56, 179, 182 (2001), available at LEXIS, Combined ALI-ABA Course of Study Materials File.

<sup>20</sup> Halden, *supra* note 18, at 716.

<sup>21</sup> Justin James Quigley, *Grand Staircase-Escalante National Monument: Preservation or Politics?*, 19 J. LAND RESOURCES & ENVTL. L. 55, 77 (1999).

<sup>22</sup> *Id.* at 77.

<sup>23</sup> Harrison, *supra* note 7, at 414; see also *National Monument Public Participation Act of 1999: Hearing on S. 729 Before the Sen. Energy and Natural Res. Comm., Subcomm. on Forests and Pub. Land Mgmt.*, 106th Cong. 44 (1999) (testimony of Marcia F. Argust, Legislative Representative of the National Parks Conservation Association) [hereinafter Testimony of Marcia F. Argust] (stating that the Antiquities Act was intended to "provide swift federal response" to the improper use of public lands, and in particular, to the "looting and destruction" of ancient Indian artifacts and dwellings in the southwest United States); 16 U.S.C. § 433 (2000) (instituting a maximum penalty of a \$500 fine and/or imprisonment for not more than ninety days for persons injuring or destroying objects of antiquity on government lands); *United States v. Diaz*, 499 F.2d 113, 115 (9th Cir. 1974) (holding the penal provision of the Antiquities Act unconstitutionally vague). *But see United States v. Smyer*, 596 F.2d 939, 941 (10th Cir. 1979) (holding the penal provision of the Antiquities Act not unconstitutionally vague).

Looting and destruction of archeological artifacts is still a problem today, although violators are convicted under numerous other statutes, not just the Antiquities Act. See, e.g., *United States v. Jones*, 607 F.2d 269, 273 (9th Cir. 1979) (holding that a conviction for destroying Indian ruins on federal lands could be sustained under the Antiquities Act penalty statute or more specific theft statutes).

<sup>24</sup> Halden, *supra* note 18, at 716.

<sup>25</sup> Quigley, *supra* note 21, at 77.

historic or prehistoric value to include "other objects of historic or scientific interest."<sup>26</sup> Such inclusion was favorable to the Department of Interior's requests, as it allowed for the preservation of "scenic beauties and natural wonders and curiosities, by Executive Proclamation."<sup>27</sup> However, western members of Congress were concerned about allowing the president to have what seemed to be limitless discretion in establishing the size of national monuments.<sup>28</sup> Hewett addressed this concern and gained the approval of the skeptical West, by inserting the language, "should be confined to the smallest area compatible with the proper care and management of the objects to be protected."<sup>29</sup>

On January 9, 1906, Representative John Lacy of Iowa introduced Hewett's bill as House Bill 11,016; on February 26, 1906, Senator Thomas Patterson of Colorado introduced the bill as Senate Bill 4698.<sup>30</sup> A series of discussions followed, revealing the purpose and the potential effects that the proposed Antiquities Act would have on public lands and the public domain. The Committee on Public Lands' report indicated that the purpose of the proposed bill was to protect American Indian ruins in the western United States by creating small reservations of the least amount of land necessary to preserve certain "relics of prehistoric times."<sup>31</sup> Such intent is reaffirmed by the fact that the committee's

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<sup>26</sup> *Id.* The "other objects" language has created great dissension among proponents and opponents of the Antiquities Act. While a few national monuments have contained actual antique objects, most have been created for more broad purposes, such as natural resource and aesthetic conservation. Those who favor a liberal interpretation of the Act believe that the president should be able to use this "catch-all" language to protect the necessary lands, while conservatives generally believe that while protecting ancient Indian artifacts is within the purview of the Act, the creation of monuments that encompass large tracts of land should be left to Congress in their appropriations of national parks and the like. See Carol Vincent Hardy & Pamela Baldwin, *RL30528: National Monuments and the Antiquities Act*, CRS REPORT FOR CONGRESS 9 (Jan. 15, 2001), available at <http://www.cnle.org/nle/crsreports/public/pub-15.pdf>. Courts have generally taken a liberal view when interpreting the "other objects" language. See *infra* Part IV.

<sup>27</sup> Quigley, *supra* note 21, at 77 (quoting RONALD F. LEE, U.S. DEP'T OF INTERIOR, THE ANTIQUITIES ACT OF 1906, at 47 (1970)). It is important to note that while the Department of the Interior found this language favorable, it is not indicative of the voice of Congress in the legislative history behind the Act.

<sup>28</sup> *Id.* at 77-78.

<sup>29</sup> *Id.* at 77. This particular language would later prove to be one of the most, if not the most, controversial components of the statute. Critics of national monuments, particularly large ones, claim that this language was meant to be interpreted narrowly and that Congress intended the Act to apply to very specific *items* of interest and a small area of land around them. Proponents of liberal use of the Act, on the other hand, claim that the Antiquities Act must be given a more broad reading, allowing the president the discretion to create a monument as large as needed to protect the resource in interest. See Hardy & Baldwin, *supra* note 26, at 8-9. For a discussion on the scope most courts have read into the Antiquities Act, see *infra* Part IV.

<sup>30</sup> Quigley, *supra* note 21, at 78.

<sup>31</sup> *Id.* (quoting H.R. REP. NO. 59-2224, at 1 (1906)).

report included a memorandum by Hewett that inventoried, grouped, and described the specific Indian ruins for which Hewett sought protection by the Act.<sup>32</sup>

In the House, Representatives Lacey and Stephens discussed the effects of the Act on the public domain.<sup>33</sup> Representative Lacey stated that the bill proposed to make no more than small reservations of land where objects of scientific interest were located.<sup>34</sup> The purpose of the bill was to cover lands and specific artifacts of cave dwellers and cliff dwellers of the ancient West, and the bill was intended to reach no further than to protect certain objects of special interest.<sup>35</sup> Ironically, at the end of the representatives' discussion, Representative Stephens stated, "I hope . . . this bill will not result in locking up other lands."<sup>36</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> A House Report concerning the proposed bill states:

There are scattered throughout the Southwest quite a large number of very interesting ruins. Many of these ruins are upon the public lands, and the most of them are upon lands of but little present value. The bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times.

Richard M. Johannsen, Comment, *Public Land Withdrawal Policy and the Antiquities Act*, 56 WASH. L. REV. 439, 450 n.85 (1981) (quoting H.R. REP. NO. 59-2224 (1906)). It is important to note that the House Report specifically points to areas of ruins in the *Southwest* portion of the U.S.; the report also specifically states that the amount of land reserved should be only as much as *absolutely necessary*. See *id.*

<sup>34</sup> Quigley, *supra* note 21, at 78.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* (quoting 40 CONG. REC. 7888 (1906) (statement of Rep. Stephens)). This statement is particularly ironic in light of the many responses to President Clinton's Grand Staircase Proclamation, which not only protected a significant amount of land, but also effectively put an end to the mining of one of the world's largest reserves of low-sulfur coal, found below the Monument's surface. Many protesting the Monument claim that President Clinton did exactly what Representative Stephens feared: he locked up public lands. See Statement of Michael E. Noel, *supra* note 6 (arguing that it is "ludicrous to *lock up* our natural resources and energy supplies") (emphasis added); Michael Satchell, *Clinton's 'Mother of All Land-Grabs'*, U.S. NEWS & WORLD REP., Jan. 20, 1997, at 42, 44 (quoting Garfield County, Utah Commissioner Louise Liston: "With the stroke of a pen and the wink of an eye, the president has *locked up* a treasure house of natural resources.") (emphasis added); Paul Rogers, *National Monument in Utah Stirs Tension*, SEATTLE TIMES, Aug. 29, 1997, at A13 (quoting Kanab City Councilman, Roger Holland: "It's un-American to *lock these places up*.") (emphasis added); Oliveria, *supra* note 12 (revealing statement of Idaho Republican Senator Larry Craig in response to Grand Staircase: "No one wants the president, acting alone, to unilaterally *lock up* enormous parts of any state.") (emphasis added); *Critics Decry Clinton "Land Grab"*, PATRIOT LEDGER (Quincy, Mass.), Sept. 19, 1996, at 12 (quoting a statement of the Senate Energy and Natural Resources Committee that President Clinton "may be *locking up* as much as 62 billion tons of clean, low-sulfur coal") (emphasis added); H. Joseph Hebert, *Congressional Delegation: Clinton Designation a Federal Land Grab*, ASSOCIATED PRESS POL. SERVICE, Sept. 18, 1996, 1996 WL



Unfortunately, the representative did not realize his wishes, despite the Act's "smallest area compatible" language. The final version of the bill passed both the House and the Senate, and on June 6, 1906, President Theodore Roosevelt signed Senate Bill 4698 into law, creating the Antiquities Act of 1906.<sup>37</sup> Within four months of the signing, President Theodore Roosevelt invoked the Antiquities Act for the first time—not to protect ancient Indian artifacts or an object of antiquity—but rather to protect what he called a "scientific" object, Devil's Tower.<sup>38</sup> President Roosevelt's action would set the precedent for broad usage of the Antiquities Act for times to come.

### III. PRESIDENTIAL POWERS UNDER DIRECTIVES AND PROCLAMATIONS

The power of the Antiquities Act must be put into perspective, for it grants to the president a power otherwise exclusively held by Congress. Historically, the Antiquities Act has provided a "back door" through which the president can protect public lands that would otherwise require an act of Congress.<sup>39</sup> While Congress holds law-making authority under the American system of government, the president also has some authority to "legislate" through executive directives. Since the founding of our nation, presidents have exercised their authority under directives, most popularly, executive orders and proclamations.<sup>40</sup> Thus, while the president's power to declare national monuments under the Antiquities Act is outdated and inappropriate, it certainly is not a unique power. Presidents since

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5407159 (stating that Utah Republican Senator Bob Bennett claimed that President Clinton "has *locked up* billions of tons of the cleanest burning coal in the United states" and that he has "*locked up* valuable school trust lands") (emphasis added).

<sup>37</sup> Quigley, *supra* note 21, at 78.

<sup>38</sup> *Id.* at 79–80. On September 24, 1906, President Theodore Roosevelt proclaimed a 1152-acre reservation in Wyoming, creating Devils Tower National Monument. *Id.* See also Halden, *supra* note 18, at 717. During his presidency, Theodore Roosevelt invoked the Act eighteen times, creating national monuments not necessarily to protect objects of antiquity, but to preserve the environment at large. See, e.g., The Wilderness Soc'y, *Listing of Presidentially Designated Monuments*, at <http://www.wilderness.org/Library/Documents/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=3058> (last visited Apr. 14, 2003) [hereinafter *Listing of Presidentially Designated Monuments*] (revealing that while some of President Roosevelt's designations protected objects of antiquity such as Montezuma Castle (prehistoric ruins and ancient cliff dwellings), Chaco Canyon (prehistoric communal and pueblo ruins), and Gila Cliff Dwellings (cliff dwellers' remains), other national monuments seemed to protect interesting natural wonders or areas of scenic beauty, such as Muir Woods (extensive growth of redwood trees), Jewel Cave (significant caverns and other geologic wonders), and Natural Bridges (mesa bisected by deep canyons, exposing cedar sandstone).

<sup>39</sup> Feller, *supra* note 19, at 182. Feller states that national monuments that are placed under the direction of the National Park Service are "practically indistinguishable" from congressionally-created national parks. *Id.*

<sup>40</sup> Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 273 (2001).

George Washington have used various forms of directives to accomplish goals the legislature could not or would not accomplish.

Presidential directives are simply written instructions or declarations issued by the president, rather than by Congress.<sup>41</sup> In the past, presidential directives have been used broadly for a variety of reasons. During the Civil War, President Abraham Lincoln used presidential directives and proclamations to run aspects of the war, expand the military, produce war ships, and provide for payments from the treasury without congressional approval.<sup>42</sup> President Franklin Roosevelt also used presidential proclamations to expand the government.<sup>43</sup> Truman followed, also having the tendency to attempt to govern by executive orders.<sup>44</sup> In short, past presidents have broadly and commonly used governance by executive orders.

There are very few rules regarding the proper use and substance of presidential directives. Tradition, historical usage, and common terminology are often the only elements directing presidential orders.<sup>45</sup> In fact, the president can often issue a directive in compliance with a statute, regardless of the specific substance of the directive, simply by placing a term like "proclamation" in the title and using a term such as "it is hereby proclaimed" somewhere in the body of the order.<sup>46</sup> Further, federal law controlling presidential orders is scarce.<sup>47</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 282–83

<sup>43</sup> *Id.* at 283.

<sup>44</sup> *Id.* In the *Steel Seizure Case*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the United States Supreme Court invalidated President Truman's executive order for the federal government to take over steel manufacturing. The Court stated that the president's authority to act or issue an executive order is most valid when the action is based on an express grant of power in the Constitution, in a statute, or both. *Id.* at 585. The president's action will most likely be considered invalid when there is no grant of authority, express or implied, by the Constitution, or when the president's action goes against a lawful statute or constitutional provision. *Id.* at 585–89. This important decision reveals that presidential proclamations under the Antiquities Act are likely valid because they are established in accordance with a statute; however, there is still question as to whether the Act itself allows for an abuse of power.

<sup>45</sup> Gaziano, *supra* note 40, at 288.

<sup>46</sup> *Id.* at 288–89. For example, President Clinton's Proclamation 6920 contains the language:

Now, therefore, I, WILLIAM J. CLINTON, President of the United States of America, by the authority vested in me by [the Antiquities Act], *do proclaim* that there are hereby set apart and reserved as the Grand Staircase-Escalante National Monument, for the purpose of protecting the objects identified above, all lands and interests in lands owned or controlled by the United States within the boundaries of the area described . . .

Proclamation No. 6920, 3 C.F.R. 64, 67 (1997) (second emphasis added). He then added, "[t]he Federal land and interests in land reserved consist of approximately 1.7 million acres, which is the *smallest area compatible* with the proper care and management of the objects to be protected" to comply with the "smallest area compatible" language. *Id.* (emphasis added).

<sup>47</sup> Gaziano, *supra* note 40, at 292.

Among the few existing rules is one requiring that proclamations and orders of general applicability and legal effect be published in the Federal Register unless the president requests that they not be published due to issues of national security or other specific reasons.<sup>48</sup> Further, some statutes giving the president directive power require the president to exercise the power through a specific type of directive or order.<sup>49</sup> These rules, however, are fairly insignificant, given that the president has free reign in his discretion.

Given the broad powers under and historical usage of presidential directives, it is understandable how President Clinton and many others have lawfully used the Antiquities Act to create large national monuments. In its brief language, the Antiquities Act requires only that the president choose land containing an object of historic or prehistoric value or some other scientific interest and that the overall land declared for the monument be no larger than necessary for the protection of those objects or land of scientific interest. There is no requirement that the president consult local officials or members of Congress. There is no requirement that the president consider the local economic impact or that he act in the best interests of the state in which the monument is to be located. There is no requirement that the president consult with environmental officials or hold hearings to warn those with interests in the lands that the property is about to be declared a protective monument. Instead, the president is authorized, via a statute drafted and passed by Congress, to determine what lands he would like to become a monument, and to issue a directive setting aside that land as such. The president's actions under the Act do not require congressional review or local consent, nor are they subject to reversal by subsequent presidential directives.<sup>50</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> However, the George W. Bush administration is considering ways to reverse President Clinton's Grand Staircase proclamation to "undo" its monument status. See Robert B. Keiter, *The Monument, the Plan, and Beyond*, 21 J. LAND RESOURCES & ENVTL. L. 521, 533 (2001). Vice President Richard Cheney revealed during the 2000 presidential campaign that the new administration might consider attempting to reverse President Clinton's designation. *Id.* However, how President Bush himself could accomplish such a task is questionable, seeing as the Act's language does not explicitly or implicitly grant any "reversal" powers. *Id.*; see also Feller, *supra* note 19, at 183 (speculating that Vice President Cheney would attempt to find a way for President Bush to revoke some of President Clinton's monuments); Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 554 (2001) (stating that it is unknown to what extent a subsequent president can alter an existing national monument, especially because the Act's language is void of any authority allowing the president to abolish a monument); Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y. Gen. 185 (1938) (arguing that the president lacks the authority to abolish a national monument). But see Feller, *supra* note 19, at 183 (stating that one could argue that the power to abolish a monument is implicit in the power to proclaim one).

Given this very discretionary process, it is apparent that while many individuals and interest groups are infuriated by the creation of certain national monuments, courts are still unwilling to reverse the proclamations declaring the monuments. The creation of national monuments, aside from a blatant disregard for the language of the Antiquities Act (which we apparently have yet to see, according to the Supreme Court, or any court for that matter),<sup>51</sup> is wholly within the president's discretion. Thus, challenges to particular proclamations on their merits are very unlikely to succeed because, like it or not, the declaration of national monuments is a legal and legitimate presidential power. President Clinton's declaration of Grand Staircase may seem to be an egregious land grab, but it is very different from what presidents since Theodore Roosevelt have legitimately accomplished under the Antiquities Act. Opponents to the creation of the Monument have argued that President Clinton's monument designation was politically motivated<sup>52</sup> and was not aimed at the legitimate "preservation of objects of natural and scientific beauty."<sup>53</sup> However, the Antiquities Act does not require a certain level of valid motivation. In fact in *Wyoming v. Franke*,<sup>54</sup> the court stated a president's motives are irrelevant in determining the validity of a monument designation under the Antiquities Act.<sup>55</sup> The Act is not based on

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<sup>51</sup> See *infra* Part IV.

<sup>52</sup> See Martin A. Nie, *In Wilderness Is Dissension*, F. FOR APPLIED RES. & PUB. POL'Y, Summer 1999, at 77-78. The monument designation came in September, just prior to the 1996 presidential election. President Clinton knew that the monument designation would increase support from environmentalists and west coast liberals who were likely to vacation at the Monument. *Id.* Those likely to be opposed to the Monument, mainly Republican Utahns, were unlikely to offer any support in the election regardless of the Monument designation.

The Clinton-Gore ticket finished last in the 1992 presidential race, behind President George Bush and Ross Perot. Todd Wilkinson, *A Monumental Challenge*, NAT'L PARKS, May/June 1997, at 28, 33. Senator Hatch, commenting on President Clinton's miserable 1992 loss in Utah claimed: "It's pretty apparent that Utah doesn't mean an awful lot to [President Clinton]." Hebert, *supra* note 36. Utah Republican Senator Bob Bennett accused President Clinton of having "blatant disregard for existing process in exchange for a campaign photo-op." Nie, *supra*, at 78. Despite any scathing words, President Clinton had little to lose by upsetting local Utahns. The environmental community's reaction was just as President Clinton planned. Executive Director of the National Resources Defense Counsel John Adams stated that President Clinton "deserves tremendous credit for his leadership and vision in preserving this portion of Utah's magnificent and unique red rock wilderness." Nie, *supra*, at 78-79. Terry Tempest Williams, author and naturalist for the Utah Museum of Natural History, called the monument designation "an extraordinary gesture . . . it's such a gift to the American people." Charles Levendosky, *Grand Staircase-Escalante: West's Newest Gold Mine*, MILWAUKEE J. SENTINEL, Oct. 6, 1996, at 1.

<sup>53</sup> Fried, *supra* note 5, at 515.

<sup>54</sup> 58 F. Supp. 890 (D. Wyo. 1945)

<sup>55</sup> *Id.* at 896. *Wyoming v. Franke* involved FDR's designation of Jackson Hole National Monument. The State of Wyoming argued that FDR designated the land as a monument as a condition of John D. Rockefeller donating the Wyoming land to the United States government.

proper intent, good morals, or best interests. Instead, it is based solely on presidential *discretion*, a value that has been interpreted quite broadly under the Antiquities Act.

Therefore, complaining about specific presidential action under the Antiquities Act is an exercise in futility. So far, according to the judiciary, no president has exceeded the undetermined legal bounds of the statute. And there are few, if any, substantive presidential directive rules or laws under which one can bring a cause of action. Thus, all that complaints about President Clinton's actions will likely accomplish is a critique of his moral character and his political motivations in an important election year. While such an analysis reveals the problems surrounding the Act itself, it is not determinative in a court of law whether a president has lawfully invoked the Act. The appropriate remedy then, which will go beyond any one president, including President Clinton, or even President George W. Bush, for that matter, is to push for abolition or for a severe amendment of the Antiquities Act. Nothing less will bar future presidents from exercising, within their lawful discretion, their rights to declare vast amounts of federal lands as national monuments.

#### IV. THE USE AND (ALLEGED) ABUSE OF THE ANTIQUITIES ACT

Despite what the public outcry and the media purport, President Clinton's use of the Antiquities Act to monumentalize Grand Staircase was not the first controversial monument designation. Since the Act's first uses by Theodore Roosevelt, presidential declarations under the Act have been scrutinized and judicially challenged. Those arguing that President Clinton abused his authority under the Act with his Grand Staircase designation revert back in history to the series of heated debates and courses of litigation that have ensued following monument proclamations. All the challenges have been seemingly futile, however, and very few changes have arisen despite the commotion made by those opposed to liberal use of the Act. To date, it has been impossible, in the view of the courts, for a president to abuse his power under the Antiquities Act. As the following accounts reveal, judicial action arguing that a president has violated his authority under the Antiquities Act will undoubtedly prove fruitless.<sup>56</sup>

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Rockefeller demanded that the land become part of Grand Teton National Park as a condition of his gift, and when Congress was unable to complete the task, Franklin Roosevelt stepped in and offered protection under national monument status. See *infra* Part IV.B.

<sup>56</sup> However, in one notable case, *United States v. California*, 436 U.S. 32, 41 (1978), the Court ended a long dispute over Franklin Roosevelt's Channel Islands National Monument, finding in favor of the party challenging Roosevelt's designation. See *Listing of Presidentially Designated Monuments*, *supra* note 38. The primary dispute over the Channel Islands was whether California or the United States had dominion over particular submerged lands within the National Monument. 436 U.S. at 33. The Court held that the Submerged Lands Act, 43 U.S.C. §§ 1301–1315 (2000), called for the transfer from the federal government to each

### A. President Theodore Roosevelt's Grand Canyon

Theodore Roosevelt's designation of the 800,000-acre Grand Canyon National Monument in 1908 was among the first monument designations to be challenged.<sup>57</sup> The reasoning behind Roosevelt's declaration was not to protect an object of antiquity, as the drafters of the Act originally intended, but rather to embalm a large scenic area of "scientific" interest for purely scientific reasons, not for protective reasons.<sup>58</sup>

Litigation began in *Cameron v. United States*,<sup>59</sup> where the plaintiff challenged the validity of the Grand Canyon National Monument with respect to mining rights the plaintiff allegedly held in the Grand Canyon.<sup>60</sup> Most of the opinion discusses whether the commissioner of the General Land Office had the right to void Cameron's mining claim; however, Cameron questioned the validity of the monument designation, arguing that the Grand Canyon did not have historical interest, and thus could not be deemed a monument under the Antiquities Act.<sup>61</sup> However, the Court refused to invalidate Roosevelt's use of the Antiquities Act, stating that the Grand Canyon was "the greatest eroded canyon in the United States, if not in the world, . . . [which] has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, [and has been] regarded as one of the great natural wonders."<sup>62</sup> While much of the opinion focused on the commissioner's rights to revoke Cameron's mining rights, the Court's words concerning the validity of Roosevelt's use of the Antiquities Act facilitated the expansion of the Act's valid uses for years to come. The *Cameron* decision made an important clarification: the Antiquities Act does

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respective state lands beneath waters within the boundaries of the state. 436 U.S. at 37. Therefore, the disputed portions of Channel Islands National Monument were actually under the control of the State of California, not the federal government, and therefore could not become part of the national monument through presidential proclamation. *Id.* at 41. This, of course, only applied to the disputed areas of the Monument. Successful disputes over monument designations have been limited to specific claims regarding the monuments. *See, e.g.,* Wilkenson v. Dep't of Interior, 634 F. Supp. 1265, 1280–81 (D. Colo. 1986) (holding that a public right-of-way through Colorado National Monument existed, and the National Park Service could not charge entrance fees to people using the Monument road to access other public roads).

<sup>57</sup> Harrison, *supra* note 7, at 416. The Grand Canyon is no longer a national monument, but is today a national park. *See Listing of Presidentially Designated Monuments*, *supra* note 38. The Grand Canyon was enlarged by President Herbert Hoover's declaration of Grand Canyon II National Monument, which joined with other area canyons to form the entire Grand Canyon National Park. *Id.*

<sup>58</sup> Harrison, *supra* note 7, at 417.

<sup>59</sup> 252 U.S. 450 (1920).

<sup>60</sup> Halden, *supra* note 18, at 718.

<sup>61</sup> Harrison, *supra* note 7, at 418.

<sup>62</sup> 252 U.S. at 456.

not have to be used simply in conjunction with ancient Indian artifacts, as originally intended by Hewett and other congressional supporters. Apparently, after *Cameron*, the Act could legitimately protect large scenic tracts of land, regardless of whether they contained objects of antiquity. The *Cameron* case accordingly set the precedent for failed challenges to the use of the Act.

### B. President Franklin D. Roosevelt's Jackson Hole

The Jackson Hole National Monument controversy began when John D. Rockefeller wanted to give the United States government over 33,000 acres of his personal land in the Grand Teton area of Wyoming. Rockefeller made the gift under the condition that the government would preserve the land by extending the Grand Teton National Park to include this property.<sup>63</sup> However, expanding the park's reach proved to be an arduous task. Numerous bills presented in Congress to expand Grand Teton failed due to local concern in Wyoming that converting private land into a national park would diminish the local tax base, causing local governments to forfeit any income to the federal government that would then control the land.<sup>64</sup> The State of Wyoming also objected to making Rockefeller's land part of Grand Teton National Park because the state did not want to forfeit to the federal government its rights to control fishing and gaming.<sup>65</sup> Debates in Congress continued for over eighteen years until President Roosevelt invoked the Antiquities Act, deeming 220,000 acres surrounding and including the Rockefeller land as Jackson Hole National Monument.<sup>66</sup>

The State of Wyoming immediately objected, challenging both the Antiquities Act's land size limitation provision as well as the historic or scientific interest provision, marking the first time in history a plaintiff had argued on both grounds.<sup>67</sup> The State argued that President Roosevelt had attempted "to substitute, through the Antiquities Act, a National Monument for a National Park, the creation of which is within the sole province of the Congress, thereby becoming

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<sup>63</sup> Harrison, *supra* note 7, at 420.

<sup>64</sup> *Id.* But see Testimony of Marcia F. Argust, *supra* note 23, at 45 (arguing that federal lands and private lands donated to the federal government have interest, not just to a particular state or locality, but to the nation as a whole).

<sup>65</sup> Harrison, *supra* note 7, at 420.

<sup>66</sup> *Id.* Lengthy congressional action (or inaction, as many might describe it) over issues to protect certain tracts of lands often leads to pressuring the president to invoke his authorities under the Antiquities Act to provide a quick remedy. See Testimony of Marcia F. Argust, *supra* note 23, at 45.

<sup>67</sup> Harrison, *supra* note 7, at 420–21. Wyoming's state congressional delegation was not merely enraged by the designation, but surprised. The delegation learned about the Monument via a telephone call from a citizen in Jackson. See 89 CONG. REC. 2236 (1943) (statement of Sen. Robertson).

an evasion of the law governing the segregation of such areas.”<sup>68</sup> Wyoming first argued that Jackson Hole did not contain objects of historic or scientific interest; it further argued that Jackson Hole was not confined to the smallest area compatible to protect that interest.<sup>69</sup>

Once again, as in the *Cameron* case, the reviewing court thwarted these challenges. At trial, the federal government asserted that natural scenery, hiking trails, and campsites served as the requisite scientific and historic interest included in Jackson Hole.<sup>70</sup> The court held that this was sufficient evidence to meet the historic or scientific interest requirement and that the area was worthy of protection under the Act.<sup>71</sup> The court further stated that it would not question the President’s discretion concerning the size of the monument.<sup>72</sup>

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<sup>68</sup> *Wyoming v. Franke*, 58 F. Supp. 890, 892 (D. Wyo. 1945). For testimony on a liberal interpretation of the Act, see Testimony of Marcia F. Argust, *supra* note 23, at 45 (admitting that an important use of the Act is to protect public land by granting monument status when Congress is “gridlocked over a conservation measure”).

<sup>69</sup> *Franke*, 58 F. Supp. at 892.

<sup>70</sup> *Harrison*, *supra* note 7, at 421. In its opinion, the court stated with regards to historic and scientific evidence: “If there be evidence in the case of a substantial character upon which the President may have acted in declaring that there were objects of historic or scientific interest included within the area, it is sufficient upon which he may have based a discretion.” *Franke*, 58 F. Supp. at 895. This seemingly indicates that there only needs to be just enough evidence to show that historic or scientific interest is present in order to validate an action under the Act. Beyond that, there is no evidentiary threshold to meet. The court further stated that there would have to be absolutely no showing of objects of historic or scientific interest in order for it to find the use of the Act “arbitrary and capricious and clearly outside the scope and purpose of the Monument Act.” *Id.*

<sup>71</sup> *Franke*, 58 F. Supp. at 895–96. The court supplemented its approval of the president’s actions by stating that the president exercised a power given to him expressly by Congress and that it was not within the court’s jurisdiction to question the president’s discretion. The court stated:

For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains. Under the Constitution it is exclusively for Congress, or those to whom it delegates authority, to determine what tariffs shall be imposed. Here the President acted in full conformity with the statute. No question of law is raised when the exercise of his discretion is challenged.

*Id.* at 896 (quoting *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940)). This is a clear indication that while some might consider presidential use of the Antiquities Act an abuse of power, it is actually the Act *itself* that must be labeled as abusive. While Congress likely believed it was conferring a legitimate power to the president in 1906, in retrospect Congress actually granted to the president a “monster” of land designation discretion. Presidents simply use their power and discretion granted to them by Congress under the Antiquities Act. Courts are increasingly looking to Congress to rectify the use of such authority. *See infra* Part V.C.4.

<sup>72</sup> *Id.* The court further remarked: “What has been said with reference to the objects of historic and scientific interest applies equally to the discretion of the Executive in defining the area compatible with the proper care and management of the objects to be protected.” *Id.*



Clearly, courts have not been willing to interfere too severely with presidents' decisions under their proclamation powers.<sup>73</sup> Once a president assembles some evidence that a certain piece of land contains historic or scientific interest, the remaining reasoning behind the designation, as well as the size of the monument, apparently fall well within the president's unquestionable discretion. Courts have agreed that Congress delegated power to the president to make such decisions, and only through congressional action can this power be taken away, no matter how egregious some might feel the use of power is.<sup>74</sup>

### C. President Truman and Water Rights at Devil's Hole

In 1952, President Harry Truman created Devil's Hole National Monument, which increased the size of Death Valley National Monument created by

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<sup>73</sup> The *Franke* opinion relies on *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827), which outlines the rules on presidential proclamations. In *Martin*, Justice Story stated, "[w]henver a statute gives discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts." *Martin*, 25 U.S. at 31–32. The *Franke* opinion also relied on *United States v. George S. Bush & Co.*, 310 U.S. 371, where the court stated:

It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review.

*George S. Bush & Co.*, 310 U.S. at 380.

<sup>74</sup> See Harrison, *supra* note 7, at 422–23. Following the creation of Jackson Hole, Congress passed legislation abolishing the monument; the president, however, vetoed it. Quigley, *supra* note 21, at 82. Later, in 1947, Congress introduced yet another bill to abolish Jackson Hole, but public opinion seemingly favored preserving the area encompassed by the monument even though many alleged the president misused his power under the Antiquities Act in creating it. *Id.* Therefore, on September 14, 1950, Congress enacted legislation adding Jackson Hole National Monument to Grand Teton National Park. *Id.* Ironically, making the land part of Grant Teton was John Rockefeller's original request when he granted the land to the United States, some twenty years earlier. See Harrison, *supra* note 7, at 420.

Additionally, the act making Jackson Hole part of Grand Teton included a provision prohibiting the president's use of the Antiquities Act to declare further national monuments in Wyoming; future national monuments would require Congress to take affirmative action. See 16 U.S.C. § 431a (2000) (stating "[n]o further extension or establishment of national . . . monuments in Wyoming may be undertaken except by express authorization of Congress."). In the aftermath of the Jackson Hole controversy, presidents seemed somewhat hesitant to invoke their power to create national monuments under the Antiquities Act; between 1943 and 1977 (from the Harry Truman presidency through the end of the Gerald Ford presidency), only six national monuments were created. See *Listing of Presidentially Designated Monuments*, *supra* note 38.

President Hoover in 1933.<sup>75</sup> A controversy arose over water rights when area landowners applied for permits to change the use of water in several wells.<sup>76</sup> When the National Park Service argued that it needed to perform a study to determine the effects the proposed changes would have on Devil's Hole, the landowners sued.<sup>77</sup> The Supreme Court held that the federal government could reserve water rights to the extent necessary to protect and serve the purpose of the monument.<sup>78</sup>

Therefore, it is apparent that a president need not include specific rights to water in his monument proclamations, as they would be included implicitly.<sup>79</sup> This decision, once again, reveals courts will defer to a president's broad discretion under the Antiquities Act. Not only is the president afforded grand powers to declare expansive amounts of land as monuments, the *Cappaert* Court furthers the trend of past courts in allowing monuments to implicitly include large quantities of water in the surrounding areas. Once again, challenges to presidential discretion under the Antiquities Act were defeated and discretion broadened, making it highly unlikely that any future court will limit presidential decisions under the Act.

#### D. President Carter's Alaska Monuments

Anyone arguing that President Clinton's 1.7 million-acre withdrawal of Grand Staircase was "unprecedented" has not studied President Jimmy Carter's monument withdrawals in Alaska.<sup>80</sup> In 1978, President Carter used the

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<sup>75</sup> See Halden, *supra* note 18, at 721. President Truman noted the "remarkable underground pool" that contained a certain species of desert fish as the reason for monumentalizing Devil's Hole. *Id.*

<sup>76</sup> *Cappaert v. United States*, 426 U.S. 128, 134 (1976).

<sup>77</sup> *Id.* at 134-35. While landowners acknowledged that they received water from the same source as Devil's Hole, they argued that the monument did not affect their water rights. *Id.* at 136.

<sup>78</sup> *Id.* at 138. Specifically, the Court stated that by the mere fact that the government created a monument, it "by implication, reserves appurtenant water" even if not originally part of the monument, if it is necessary to "accomplish the purpose of the reservation." *Id.*

<sup>79</sup> The Court attempted to limit this "implied-reservation-of-water rights" doctrine by establishing a parameter that the amount of water implicitly reserved is "only that amount of water necessary to fulfill the purpose of the reservation." *Id.* at 141. However, like the limiting language of the Antiquities Act itself ("smallest area of land necessary"), it seems unlikely that this water rights doctrine will have any real impact in the court system.

<sup>80</sup> See Ranchod, *supra* note 50, app. A, at 585. A look at the size of President Carter's national monuments, in comparison with all other monuments of any other president, is shocking. Some of President Carter's larger Alaskan Monuments, all of which were declared on the same day, include Wrangell-St. Elias (10,950,000 acres), Yukon Flats (10,600,000 acres), Gates of the Arctic (8,220,000 acres), and Noatak (5,800,000 acres). Few of the monuments

Antiquities Act to create, simultaneously, fifteen national monuments encompassing *fifty-six million acres* of Alaskan land.<sup>81</sup> With this reservation, Carter monumentalized over four and a half times the total amount of land of all national monuments combined until that time.<sup>82</sup> Much like President Franklin Roosevelt's Jackson Hole, President Carter's Alaskan withdrawals were apparently somewhat politically motivated in an effort to protect land that Congress could not.<sup>83</sup>

The State of Alaska brought suit in the United States District Court for an injunction against Carter's use of the Antiquities Act.<sup>84</sup> Alaska argued that the president was required to file an environmental impact statement under the requirements of the National Environmental Policy Act of 1969 ("NEPA").<sup>85</sup> The court decided, however, that under a presidential proclamation, the president was not required to file an environmental impact statement, as NEPA only requires federal agencies to file such statements, and the president is not a federal agency.<sup>86</sup> Therefore, Carter was free to use broad discretion with the Alaskan lands, regardless of any NEPA standards or requirements. Once again, courts were unwilling to hinder presidential action under the Antiquities Act, even in response to this absolutely unprecedented monument declaration. Further, Carter was able to designate and protect lands while sidestepping the requirements of NEPA, something that no other governmental body or agency can do. Following President Carter's declaration, it appeared likely that action under the Antiquities Act would have no boundaries.<sup>87</sup>

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even arguably included objects of antiquity, but instead protected unspoiled ecosystems, herds of animals, glaciers, mountains, fjords, and cliffs. *See id.*

<sup>81</sup> *See* Proclamation Nos. 4611–4617, 4620–4627; 3 C.F.R. 69–83, 88–104 (1979); *see also* 43 Fed. Reg. 57,009–52, 57,067–131 (Dec. 5, 1978) (illustrating the boundaries of the newly proclaimed monuments).

<sup>82</sup> Quigley, *supra* note 21, at 83. Up until this point, the combined land area of all national monuments created under the Antiquities Acts totaled twelve million acres. *Id.*

<sup>83</sup> *See id.* at 82–83. Congress passed the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601–1629 (2000), in 1971 in order to determine the proper use and protection of public lands in Alaska. *Id.* Section 16(d)(2) of the ANCSA allows the Secretary of the Interior to withdraw up to eighty million acres of land in order to create national parks, forests, wildlife refuges, or wild and scenic river systems. *Id.* Upon withdrawal of this land, Congress had until December 16, 1978, to affirmatively act to confirm the secretary's decisions, or the land would return to normal public land. *Id.* As the December date neared, because President Carter feared that congressional acquiescence would not take place, he invoked the Antiquities Act, reserving a good portion of the land for national monuments. Quigley, *supra* note 21, at 82–83.

<sup>84</sup> *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978).

<sup>85</sup> *Id.* at 1160.

<sup>86</sup> *Id.* at 1159–60.

<sup>87</sup> While litigation was ensuing in *Alaska v. Carter*, another important case challenging Carter's monuments arose, *Anaconda Copper Co. v. Andrus*, 14 Env't Rep. Cas. (BNA) 1853

Unlike most previous monuments, Carter's monuments did not last long. In December 1980, Congress enacted the Alaska National Interest Lands Conservation Act ("ANILCA").<sup>88</sup> With one sweeping step, Congress affirmatively repealed all of the national monuments declared by President Carter.<sup>89</sup> Following the precedent set by congressional action regarding the Jackson Hole National Monument, whereby no additional monuments could be created under the Antiquities Act in Wyoming, ANILCA required congressional approval for any monument reservations created in Alaska under the Antiquities Act that encompassed more than five thousand acres of land.<sup>90</sup> However, Alaska and Wyoming are currently the only two states subject to congressionally

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(D. Alaska 1980). The complainants claimed that President Carter exceeded his authority under the Antiquities Act by withdrawing far more land than necessary. *Id.* at 1853. The court refused to limit President Carter's decision, stating that the Supreme Court itself had approved past presidents' expansive use of the Act. *Id.* at 1855. Further, Congress had clearly acquiesced to the historical expansive use of the Act, as Congress had not in nearly eighty years taken any action to limit the Act's reach. *Id.* at 1855. The court refused to decide whether the president exceeded his authority under the Act, but instead only looked to whether the proclamations on their faces were sufficient to meet the requirements of the Act; finding that the monuments included sufficient geological and ecological areas, the court determined that the proclamations were sufficient. *Id.* at 1854–55. The court did admit, however, that there were limits on presidential authority under the Act, but that those limits were, to date, undefined. *Id.* at 1854. Therefore, despite the fact that congressional action made the facts of this case and *Carter* moot, the *Anaconda* court held that while limits under the Antiquities Act allegedly exist, the president still did not exceed those limits. It appears, then, that these limits are merely illusory, as no court seems willing to impose any real limits on presidential proclamations.

<sup>88</sup> See 16 U.S.C. §§ 3101–3223 (2000).

<sup>89</sup> See 16 U.S.C. § 3209(a) (2000). Most of the monument land revoked by Congress was preserved under other means throughout the ANILCA. See Quigley, *supra* note 21, at 83 & n.206; see also *Listing of Presidentially Designated Monuments*, *supra* note 38 (noting that the current size of President Carter's monuments is substantially the same, or in some cases larger, than his original designation). Additionally, litigation under *Alaska v. Carter* and other cases became moot, as the monuments were no longer in existence. Quigley, *supra* note 21, at 83. Some view this congressional action not as one of disfavor with the Alaskan Monuments, but rather as affirmative acquiescence to the president's actions. See *National Monument Public Participation Act of 1999: Hearings on S. 729 Before the Subcomm. on Forests and Pub. Land Mgmt. of the Senate Comm. on Energy and Natural Resources*, 106th Cong. 8–9 (1999) (testimony of George Frampton, Acting Chair of Council on Environmental Quality, Executive Office of the President) (claiming that the Alaskan Monuments were "embraced" by the public and "ratified" by Congress through the passage of the ANILCA). Considering that Congress was working to protect the Alaskan lands on its own prior to Carter's designation; that it later revoked Carter's monuments, protecting the land as it saw fit, and finally that it included a provision in ANILCA severely limiting presidentially proclaimed monuments in Alaska, to say Congress "embraced" or "ratified" Carter's actions is an obvious embellishment. Instead, Congress "junked" Carter's proclamation, resumed its own conservation efforts, and wrapped things up with a severe reprimand to the president and to future presidents, banning their seemingly-limitless use of the Antiquities Act in Alaska.

<sup>90</sup> See 16 U.S.C. § 3213(a) (2000).

imposed restrictions regarding presidential proclamations under the Antiquities Act.

### E. President Clinton and the Giant Sequoia National Monument

President Clinton's Grand Staircase-Escalante National Monument did not mark his only designation to cause discontentment and subsequent litigation surrounding his use of the Antiquities Act.<sup>91</sup> In April 2000, President Clinton set aside over 327,000 acres within the Sequoia National Forest, establishing Giant Sequoia National Monument.<sup>92</sup> The land contained "[m]agnificent groves of towering giant sequoias,"<sup>93</sup> which are not only the largest trees in existence, but also have one of the longest life spans.<sup>94</sup>

Controversy began when certain individuals and groups with an interest in the use of Sequoia National Forest land<sup>95</sup> that falls within the Sequoia Monument filed an action against President Clinton and federal agencies, alleging a violation of the Antiquities Act.<sup>96</sup> The plaintiffs' argument, quite similar to the pattern of arguments advanced in a long line of previous litigation, was that Great Sequoia National Monument was too large because the sequoia groves only constituted approximately 20,000 acres of the over 327,000 acres set aside; in other words, the sequoias only made up six percent of the monument's total area.<sup>97</sup> The results

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<sup>91</sup> The cases involved in the litigation of Grand Staircase-Escalante National Monument are discussed in-depth in *infra* Part V.C. The five cases discussed in the present section are meant to convey the general tone of the courts toward challenges under the Antiquities Act.

<sup>92</sup> *Tulare County v. Bush*, 185 F. Supp. 2d 18, 21 (D.D.C. 2001). See Proclamation No. 7295, 3 C.F.R. 60 (2001), for the presidential proclamation creating Giant Sequoia National Monument on April 15, 2000.

<sup>93</sup> Proclamation No. 7295, 3 C.F.R. 60, 60 (2001).

<sup>94</sup> *Id.* Sequoias live more than 3200 years. Aside from being very large and long-lived, sequoias are the only trees large enough to provide adequate nesting areas for California condors. *Id.* at 61. Without these trees, the Condor must nest on cliff faces. *Id.* Interestingly, the last known pair of condors breeding in the wild was located in a giant sequoia that happens to be located on the grounds of the new monument. *Id.*

<sup>95</sup> Plaintiffs generally use the monument area for business and recreational uses. *Tulare County*, 185 F. Supp. 2d at 22. The plaintiffs included Tulare County, California, which is made up of land near and within the monument, Sierra Nevada Forest Products, High Desert Multiple-Use & Stewardship Coalition, and Sugarloafers Snowmobile Association. *Id.*

<sup>96</sup> *Id.* at 21. The plaintiffs also alleged that there were violations of the National Forest Management Act, 16 U.S.C. § 1600 (2000), the National Environmental Policy Act, 42 U.S.C. § 4321 (2000), the Administrative Procedure Act, 5 U.S.C. § 701 (2000), and the Property Clause of the U.S. Constitution, U.S. CONST. art. IV, § 3, cl. 2. *Tulare County*, 185 F. Supp. 2d at 21.

<sup>97</sup> *Tulare County*, 185 F. Supp. 2d at 23. In total, the plaintiffs alleged nine claims, many of which have been quite common (and unsuccessful) in Antiquities Act litigation: (1) the proclamation violated the Antiquities Act because no objects of historic or scientific interest were identified with reasonable specificity; (2) the proclamation violated the Antiquities Act

of this "over-inclusive" monument, as the plaintiffs alleged, were a significant decrease in timber sales, restrictions on recreational uses, and restraints on access rights to the monument.<sup>98</sup> The United States District Court for the District of Columbia heard the case on the defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted.<sup>99</sup>

It is not too surprising that the district court quickly dismissed the first claims regarding alleged violations of the Antiquities Act. The court reasoned that the judiciary was severely limited in its ability to review congressionally authorized presidential actions.<sup>100</sup> Congress granted the president the power to create monuments at his sole discretion, and the court stated that reviewing actions under the power would "invade the legislative and executive domains."<sup>101</sup> In essence, the court refused to review any of the determinations and factual findings that served as the basis of President Clinton's declaration.<sup>102</sup>

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because it designated objects for the basis of the monument that do not qualify under the Act; (3) the proclamation violated the Antiquities Act because the size of the monument fails to conform to the "smallest area compatible" language of the Act; (4) the proclamation violated the Antiquities Act because it actually increased the risk of harm to the alleged objects of historic and scientific interest within the monument; (5) the proclamation violated the Property Clause of the U.S. Constitution; (6) the proclamation violated the National Forest Management Act by withdrawing land from the National Forest System; (7) the designation of the Forest Service as the monument's management body violated the National Forest Management Act and its planning regulations; (8) the management of the monument violated the National Environmental Policy Act; and (9) the proclamation violated valid existing rights, including those embodied in the Mediated Settlement Agreement. *Id.* at 22.

The language of Proclamation 7295 establishing the Giant Sequoia Monument explicitly states: "The establishment of this monument is subject to valid existing rights." Proclamation No. 7295, 3 C.F.R. 60, 63 (2001). Timbering in the monument, on the other hand, was severely restricted. Timber sale contracts executed prior to December 31, 1999 could be executed, but no other portion of the monument could subsequently be considered for timber usage, except for situations where it was "clearly needed for ecological restoration and maintenance or public safety." *Id.*

<sup>98</sup> *Tulare County*, 185 F. Supp. 2d at 23.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 24. The court stated that the judgment used by any public officer in taking legislative action cannot be reviewed by the courts; therefore, presidential declarations, made in accordance with presidential discretion granted in a congressionally-enacted statute, could not be reviewed either. *Id.*

<sup>101</sup> *Id.* at 25; *see also* *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940) ("It has long been held that where Congress has authorized a public officer to take . . . legislative action when in his judgment that action is necessary or appropriate . . . , the judgment . . . is not subject to review.").

<sup>102</sup> *Tulare County*, 185 F. Supp. 2d at 25. The court said it would only look to the face of the proclamation in determining whether it had violated any of the terms of the Antiquities Act. *Id.* But considering that the court refused to second-guess the president's discretion in the matter, as long as the proclamation listed something to be protected and contained "smallest

Instead, the court simply conducted a review of the proclamation, looking only at the face of the document. Because the document described objects of scientific and historic interest, the court held that the proclamation, on its face, satisfied the requirements of the Antiquities Act.<sup>103</sup> Further, the proclamation specifically stated that the monument was confined to the smallest area possible; the court found this language satisfied the size requirements of the Act.<sup>104</sup> The plaintiffs further argued that President Clinton had violated the Property Clause of the Constitution because his designation was "without meaningful limitation."<sup>105</sup> The court did not find this argument persuasive either, stating that Congress does not violate the Constitution simply because it conveys upon the president power that includes broad terms and a certain level of discretion.<sup>106</sup>

The plaintiffs also made the argument that the proclamation violated the National Forest Management Act ("NFMA")<sup>107</sup> because the NFMA explicitly states that no land within a national forest can return to the public domain except by an act of Congress.<sup>108</sup> The court held that the proclamation did not return the land to public domain, but rather shifted the designation and use of the land from one management purpose to another.<sup>109</sup> In fact, the proclamation clearly stated

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area possible" language, it was sufficient under the Antiquities Act. The overturning of the proclamation in *Tulare County* was highly unlikely, considering the plaintiffs' claims so closely followed the complaints in earlier cases, all of which resulted in the courts upholding the presidents' monument designations.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* Interesting to the court's analysis of the proclamation is that the court argued that it was not at liberty to scrutinize the proclamation beyond what was contained on the face of the document. Therefore, the court did not determine whether the 327,000-acre monument was really confined to the smallest area possible for the protection of the objects; rather, the court only looked to see if the proclamation *stated* that the monument was confined to the smallest area possible. Such a holding clearly supports the president's nearly unlimited discretion in designating a monument because a court likely will not review its actual size, but instead will only look to verify that the proclamation claims that the land is an appropriate size. The amount of the president's discretion in this situation is, to say the least, tremendously, and even dangerously, expansive.

<sup>105</sup> *Id.* at 26.

<sup>106</sup> *Id.* (citing *Touby v. United States*, 500 U.S. 160, 165 (1991)). The court argued, "President Clinton's Proclamation has meaningful limitations and follows the standards delineated by Congress in the Antiquities Act." *Id.*

<sup>107</sup> 16 U.S.C. § 1600 (2000).

<sup>108</sup> 16 U.S.C. § 1609 (2000). "Public domain," however, has been defined as "land available for sale or settlement under homestead laws, or other types of dispositions pursuant to land laws. *Tulare County*, 185 F. Supp. 2d at 26 (citing *Hagen v. Utah*, 510 U.S. 399, 412 (1994)).

<sup>109</sup> See *Tulare County*, 185 F. Supp. 2d at 27. The court held that the president did not withdraw the land from Sequoia National Forest, although he did change its use under public land laws. Instead, Giant Sequoia Monument held dual status as a national monument and as part of the Sequoia National Forest. *Id.*

that the secretary of agriculture, through the National Forest Service, would continue management of the monument, just as the Forest Service did when the area was solely a national park.<sup>110</sup>

Finally, the district court held that the Administrative Procedure Act<sup>111</sup> and the National Environmental Policy Act<sup>112</sup> did not apply to actions by the president. The court pointed out, just as the *Carter* court did, that the president is not considered a federal agency, and absent any indication that the statutes specifically apply to the president, the acts do not apply to that office.<sup>113</sup> With all of the plaintiffs' claims having no merit, the district court granted the defendants' motion to dismiss. On appeal, the court affirmed the dismissal.<sup>114</sup> Once again, claims of violations of the Antiquities Act were swiftly overturned and expelled from court.

While courts have consistently been involved in Antiquities Act litigation, at no time has a court attempted to question or limit a president's decision under the Act. Courts have continually been hesitant even to become involved in the declaration of national monuments; the cases referred to *supra* indicate that the judiciary tends to quickly turn a deaf ear to complaints regarding presidential use of the Antiquities Act. Presidential proclamations and executive orders are considered within the congressionally granted powers of the president, and the judiciary cannot undermine the president's discretion. Courts have traditionally taken the position that the doctrine of separation of powers prohibits them from interfering, even remotely, with any presidential proclamation, especially those made under the Antiquities Act, regardless of whether the particular proclamation seemingly falls within the intended purpose of the Act.

Thus, in looking forward to the ensuing litigation surrounding President Clinton's Grand Staircase, the probability of the complainants' success is quite bleak. The judiciary is not the appropriate forum to reverse or stop a monument's existence. History has shown that those disgruntled with a president's decision to

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<sup>110</sup> *Id.*

<sup>111</sup> See 5 U.S.C. §§ 701–706 (2000). The Administrative Procedure Act states: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

<sup>112</sup> See *supra* note 85 and accompanying text (discussing NEPA's inapplicability to presidents).

<sup>113</sup> *Tulare County*, 185 F. Supp. 2d at 28.

<sup>114</sup> *Tulare County v. Bush*, 306 F.3d 1138, 1144 (D.C. Cir. 2002). On the same day, the District Court for the District of Columbia also affirmed the dismissal of a complaint alleging President Clinton had abused his power under the Antiquities Act in creating six national monuments, near the end of his term in office, in Colorado, Oregon, Washington, and Arizona. *Mountain States Legal Found. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002). The court reasoned that Mountain States failed to allege facts supporting its claim of abuse of discretion; the court also pointed to the language in each of the monument proclamations, where President Clinton had fulfilled the Antiquities Act's "policies and requirements." See *id.*



form a national monument can continually point fingers at the president, but nothing short of an act of Congress will reverse or change actions under the Antiquities Act. Only subsequent congressional action in the Jackson Hole controversy (making it part of Grand Teton National Park and prohibiting further use of the Act in Wyoming) and congressional action in the Alaskan controversy (protecting the monuments under the ANILCA and prohibiting further use of the Act in Alaska) have made any lasting impact on presidential proclamations for national monuments. Never has a court held that a president abused his power or discretion under the Act, for courts refuse to look beyond the face of the proclamation in their determinations.

Each individual may have his or her opinion as to whether President Clinton abused his power under the Antiquities Act. However, based on the history of complaints surrounding national monuments, the judiciary is not concerned with these arguments. According to the courts, a president's discretion is so broad that no president, thus far, has abused his power under the Act. Therefore, the Act itself, not the president's use of it, is abusive. Even if Grand Staircase were reversed, a future president could, legitimately within his or her discretion, create another monument in any state containing federal land (with the exception of Alaska and Wyoming). Litigation over selective monuments will not bring about the cessation of the use of this abusive power. The only answer, then, to stop the continued use of this power is for Congress to revoke the Antiquities Act expressly.

#### V. PRESIDENT CLINTON'S CREATION OF GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT

Much like the monument proclamations of the past, more than antiquity and environmental protection fueled President Clinton's Grand Staircase designation. Just as President Franklin Roosevelt proclaimed Jackson Hole to further legislation and President Carter created monuments in Alaska to protect land he feared Congress could not or would not protect, President Clinton interfered with protection of Utah lands that were already under consideration by a variety of agencies to become protected lands. President Clinton's actions follow those of many past presidents who allegedly misused the Act. Courts, however, have traditionally upheld presidential decisions, and the Act has stood strong in its original form. Debate in the legislature and judiciary continues to simmer today over Grand Staircase as well as the Antiquities Act. With yet another burdensome controversy over a national monument, will President Clinton's Grand Staircase become the straw that breaks the camel's back?

### A. *The History of the Wilderness Act*

Concerned that some wilderness areas lacked needed protection, in 1964 Congress passed the Wilderness Act<sup>115</sup> to protect certain designated undeveloped lands. Under the Wilderness Act, the secretary of agriculture and the secretary of the interior were directed to study certain lands within their jurisdictions and to make recommendations concerning their viability and suitability as wilderness areas.<sup>116</sup> After the secretaries made the recommendations, the lands would become Wilderness Study Areas ("WSAs"), which would then be inventoried by the Bureau of Land Management ("BLM").<sup>117</sup> Upon BLM inventory of the lands, the BLM would make a recommendation to the president, who would then recommend to Congress, which, if any, of the WSAs should become wilderness areas. Until Congress makes the designation, the BLM is instructed to manage the WSAs in a manner that protects its suitability for wilderness classification.<sup>118</sup>

Prior to President Clinton's designation of Grand Staircase as a national monument, approximately 900,000 acres of land within the present monument were classified as WSAs and were managed by the BLM pursuant to the Wilderness Act.<sup>119</sup> However, Congress had not yet made any final decisions regarding turning the WSAs into formal Wilderness Areas by the time President Clinton made his proclamation.<sup>120</sup>

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<sup>115</sup> 16 U.S.C. §§ 1131–1136 (2000).

<sup>116</sup> 16 U.S.C. § 1132(d)(1).

<sup>117</sup> 16 U.S.C. § 1131. The Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1781 (2000), instructs the Bureau of Land Management to conduct a study of the WSAs.

<sup>118</sup> See 16 U.S.C. § 1133 (2000). Specifically, the BLM must protect the land from invasion of industry and other commercial enterprises, the use of vehicles and other motorized equipment on the land, the building of roads, the mining of oil or gas, and the leasing of oil or gas sources on the land. *Id.*

<sup>119</sup> *Utah Ass'n of Counties v. Clinton*, Nos. 2:97 CV 479, 492, 863, 1999 U.S. Dist. LEXIS 15852, at \*15 (D. Utah Aug. 11, 1999).

<sup>120</sup> *Id.* The 900,000 acres recommended by the BLM for WSAs were roadless. The remaining 800,000 acres that made up Grand Staircase National Monument were not roadless; the BLM released them from further wilderness study. It is also interesting to note that of the 900,000 acres recommended for wilderness study, the BLM, after further study, revised its recommendation to only 350,000 acres for wilderness designation. The BLM based its revised conclusion on the assumption that the mineral and mining potential in the remaining lands clearly outweighed the benefits of wilderness protection. See *id.* at \*17 n.8. The mining potential to which the BLM referred became one of the most controversial components of the litigation concerning the Monument designation.

### B. Grand Staircase-Escalante Becomes a National Monument

The story behind the creation of Grand Staircase is long and complex. Portions of the Grand Staircase were originally included in lands recommended by the BLM and Secretary of the Interior Manuel Lujan to President George Bush in 1991.<sup>121</sup> The land was recommended for wilderness designation, and it represented over a decade of BLM study as well as local public input.<sup>122</sup> However, when President Clinton took office, the new secretary of the interior, Bruce Babbitt, disagreed with Lujan's recommendations, and the plan was discarded.<sup>123</sup>

Subsequently, the 104th Congress attempted to pass several wilderness bills with respect to other Utah lands. However, the bills did not receive a vote in either house, and Secretary Babbitt ordered a second wilderness inventory.<sup>124</sup> During this review, Andalex Company, which held coal mine leases on federal lands that would eventually become Grand Staircase, initiated the process to secure permits to mine the land and began creating an environmental impact statement, as required by federal law.<sup>125</sup> In an attempt to thwart the progression of the mining operation, the Department of the Interior approached President Clinton and the chair of the Council on Environmental Quality ("CEQ") to propose a national monument in Utah to compensate for failed legislation.<sup>126</sup>

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<sup>121</sup> *Id.* at \*16.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* The 800,000 acres of Secretary Babbitt's wilderness inventory were, ironically, the same 800,000 acres referred to in *supra* note 85; these acres were released from further wilderness study under the George W. Bush administration because they contained roads and were not considered as suitable for protection as other proposed lands. *See id.* at \*17 n.8.

<sup>125</sup> *Utah Ass'n of Counties*, 1999 U.S. Dist. LEXIS 15852 at \*18. Andalex sought to mine a coalfield located in the Kaiparowits Plateau, land that later became part of the Monument. The Utah Geological Survey estimated that the coalfield represented the largest un-mined coal reserve in the continental U.S., containing an estimated 62.3 billion tons of coal; approximately 11.3 billion tons were estimated to be recoverable. Over the life of the lease, Andalex would have paid the federal government around \$20 billion; under the Mineral Leasing Act, the State of Utah and Utah counties would have been entitled to *half* of those funds. *See id.* at \*18 n.9. Therefore, it is clear that mining the Kaiparowits Plateau would have a very positive economic impact on southern Utah. It is further understandable from this economic standpoint alone why many Utahns and Utah communities adamantly opposed President Clinton's designation, as \$10 billion in royalties were essentially ripped from their hands.

<sup>126</sup> *Id.* at \*19. Plaintiffs in *Utah Ass'n of Counties* argued that the reason for the requested Monument was to permit the government to subvert NEPA and FLMPA standards. As the court in *Carter* held, the president is not a federal agency and is not required to file certain documents, such as an environmental impact statement, under the requirements of NEPA or FLMPA. *Id.* at \*20. There is also proof that the CEQ recognized that if a monument were created under the Antiquities Act, it would undoubtedly be contested. Thus, Kathleen McGinty, Chair of the CEQ, recommended that a " 'credible record' " be created " 'that will withstand

Between March and September of 1996, CEQ Chair Kathleen McGinty worked closely with officials of the Department of the Interior to determine which Utah lands should be subject to the monument proclamation.<sup>127</sup> Ultimately, 1.7

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legal challenge.’ ” *Id.* at \*20–21 (quoting e-mail from Kathleen McGinty to Todd Stern (July 29, 1996)). McGinty suggested that three actions occur in order to greatly improve the chances of the Monument passing judicial scrutiny if and when challenges were made: (1) the president should formally ask the secretary of the interior to look into the lands of the proposed monument to determine their scientific, cultural, and historic value; (2) the secretary should carefully review the land and make a proper recommendation to the president; and (3) the president must find the secretary’s recommendation persuasive, and thus choose to exercise his authority under the Antiquities Act, creating a national monument in the Grand Staircase area of Utah. *Id.* at \*20. McGinty also suggested that the President send his formal request to the Secretary as soon as possible so the “ ‘secy [sic] has what looks like a credible amount of time to do his investigation of the matter.’ ” *Id.* (quoting e-mail from Kathleen McGinty, to Todd Stern (July 29, 1996)). Further, McGinty instructed that the letter be drafted to as to “ ‘mak[e] it clear that the president and babbitt [sic] had discussed this some time ago.’ ” *Id.* at \*21. Given this analysis, it is evident that the Clinton administration was well aware of the litigation that commonly followed the designations of monuments. The Clinton administration was also well aware of the fact that courts have traditionally refused to interfere with presidential proclamations under the Antiquities Act so long as they can find some, albeit slight, evidence proving that the President had acted within the terms of the Antiquities Act, that is the President had used his discretion and that some historic, cultural, or archeological value could be found on the land. A president’s motives matter very little, as past cases have revealed. Thus, it was of little importance that the Clinton administration attempted to create a paper trail indicating, even falsely, that this monument proposal came about legitimately. If the Clinton administration could accomplish the three goals McGinty suggested, President Clinton would surely hit a home run with the Monument, and no one short of Congress would be able to change it, regardless of whether he had a legitimate motive. *See also* Keiter, *supra* note 50, at 532 (stating that “[o]f course there was an overt political element to the designation ”); *Critics Decry Clinton “Land Grab”*, *supra* note 36 (quoting Colorado Republican Representative Wayne Allard: “[The creation of the Monument is] the worst example of election-year grandstanding I have ever witnessed”).

<sup>127</sup> *Utah Ass’n of Counties*, 1999 U.S. Dist. LEXIS 15852, at \*22. During the study, Kathleen McGinty expressed her reservations about creating a monument in Utah. McGinty stated, “ ‘i’m [sic] increasingly of the view that we should just drop these utah [sic] ideas . . . I do think there is a danger of “abuse” of the withdraw/antiquities authorities especially because these lands are not really endangered.’ ” Quigley, *supra* note 21, at 89 (quoting e-mail from Kathleen McGinty to J. Glauthier (Mar. 25, 1996)). Considering that the administration did not believe the lands were in immediate danger, it is even more evident that President Clinton’s designation of Grand Staircase was motivated by more than just a desire to protect the environment. Strong evidence indicates that President Clinton created Grand Staircase solely for political reasons in an attempt to gain the support of tourists and environmental groups, just prior to the 1996 presidential election. This theory is present in a memorandum sent to President Clinton by Kathleen McGinty:

“[T]he political purpose of the Utah event [the designation of Grand Staircase-Escalante National Monument] is to show distinctly your willingness to use the office of the President to protect the environment. . . . Designation of the new monument would create a compelling reason for persons who are now disaffected to come around and

million acres in southern Utah were chosen. On September 18, 1996, President Clinton stood on the south rim of the Grand Canyon in Arizona, not Utah, and officially proclaimed the Grand Staircase-Escalante National Monument, creating the largest monument in land size in the continental United States.<sup>128</sup> In his remarks, President Clinton stated that Grand Staircase was created to preserve objects of geologic, paleontological, archeological, biological, and modern human history.<sup>129</sup> To support his decision, President Clinton specifically mentioned the resources that the Monument would protect.<sup>130</sup>

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enthusiastically support the Administration . . . [T]he new monument will have particular appeal in those areas that contribute the most visitation to the parks and public lands of southern Utah . . . , coastal California, Oregon and Washington, [and] southern Nevada. Opposition to the designation will come from some of the same parties who have generally opposed the Administration's natural resources and environmental policies and who . . . are unlikely to support the Administration under any circumstances."

Quigley, *supra* note 21, at 89–90 (quoting Memorandum from Kathleen A. McGinty, Chair of Counsel of Environmental Quality, to William J. Clinton, President of the United States 2–3 (Aug. 14, 1996)). The designation of Grand Staircase was not expected to go over well with the conservative electorate of Utah. Because President Clinton had little chance of winning Utah in the election regardless of his designation of the monument, he was unlikely to lose any significant votes as a result of his proclamation. A Utah monument provided a no lose situation. See Quigley, *supra* note 21, at 90.

<sup>128</sup> *Utah Ass'n of Counties*, 1999 U.S. Dist. LEXIS 15852, at \*22. Utah Representative Bill Orton was tipped off on September 7, 1996, when he received an article from the *Washington Post* reporting that the White House was considering using the Antiquities Act to create a national monument in Orton's district. See Satchell, *supra* note 36. However, upon subsequent inquiries to the White House, and specifically to Kathleen McGinty, the Clinton administration responded, "Don't worry; nothing is imminent; no decision has been made." Satchell, *supra* note 36. Later, it became clear that something certainly *was* imminent. See *supra* note 127 (revealing McGinty's plan for Grand Staircase National Monument).

<sup>129</sup> Quigley, *supra* note 21, at 85. President Clinton also argued that he was concerned about a large coalmine that was to be located on the Monument and that "we shouldn't have mines that threaten our national treasures." *Utah Ass'n of Counties*, 1999 U.S. Dist. LEXIS 15852, at \*22 (quoting *Remarks Announcing the Establishment of the Grand Staircase-Escalante National Monument at Grand Canyon National Park, Arizona*, 32 WKLY COMP. PRES. DOC. 1785, 1787 (Sept. 18, 1996)). To make sure the proclamation would undoubtedly pass judicial scrutiny under *Franke* and *Anaconda*, the proclamation specifically stated that the Monument encompassed "the smallest area compatible with the proper care and management of the objects to be protected." Proclamation No. 6920, 3 C.F.R. 64, 67 (1997).

<sup>130</sup> Quigley, *supra* note 21, at 86. President Clinton stated that the upper Escalante Canyons would be protected for their "exposed sandstone and shale deposits in shades of red, maroon, chocolate, tan, gray and white." 3 C.F.R. at 65. These characteristics are seemingly more scenic than geologic in nature, although courts have upheld protecting scenic features before, such as the Grand Canyon and Devil's Tower. See Quigley, *supra* note 21, at 86. President Clinton further alleged that paleontological resources would be protected; strangely, an inventory of Grand Staircase indicated that it was unknown whether any paleontological specimens existed on the Monument. Quigley, *supra* note 21, at 86–87. The proclamation also pointed to archeological specimens that would be protected. President Clinton argued that

### C. Subsequent Congressional Action

While the Antiquities Act does not contain any language requiring, or even allowing, Congress to ratify or acquiesce in any way to a presidential proclamation, Congress has in the past expressed its dissatisfaction with monument designations by taking affirmative action.<sup>131</sup> On the other hand, Congress has often given its approval to national monuments, offering monuments additional support and protection.<sup>132</sup> Many arguing for the legitimacy of President Clinton's Grand Staircase proclamation claim that his designation has received a favorable response from Congress, as Congress has "acquiesced" to the designation through a series of subsequent actions.<sup>133</sup> But Congress's actions do not indicate *agreement* with President Clinton's proclamation.<sup>134</sup> Instead, congressional measures merely attempted to mitigate the damage caused by President Clinton's unilateral declaration of the Monument.

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places within the Monument were used by Native American cultures and included "rock art panels, occupation sites, campsites, and granaries." 3 C.F.R. at 65. However, an archeological assessment of Grand Staircase indicates that the archeological resources within the Monument are not well known—in fact, most have yet to be discovered, if they exist at all. *See* Quigley, *supra* note 21, at 87. *But see* DUNCAN METCALFE, *An Archeological Assessment*, in VISIONS, *supra* note 5, at 37 (approximating 100,000 archeological sites within the Monument).

Finally, President Clinton argued "the monument is an outstanding biological resource." 3 C.F.R. at 66. However, southern Utah is often "described as 'sterile . . . and sparse' and a 'parched, desolate landscape.'" Quigley, *supra* note 21, at 87 (quoting Shaun Stanley, *The Last Place*, DENVER POST, Nov. 17, 1996, at A1). It appears that while he advanced many arguments for designating the Monument, the legitimacy of his reasoning is questionable. However, based on prior court cases, President Clinton understood that he would only need to put forth some evidence that any of the objects intended to be protected by the proclamation existed within the Monument, and his designation would likely pass judicial scrutiny. The Clinton administration certainly understood just how to play the "game" of national monument designation.

<sup>131</sup> *See supra* Part III.B. (discussing Congress's action in forbidding any further national monuments in Wyoming); *supra* Part III.D. (describing Congress's revocation of President Carter's Alaskan national monuments).

<sup>132</sup> *See* Keiter, *supra* note 50, at 532. Congress has offered additional protection to presidentially created national monuments by converting them into national parks. Zion, Capitol Reef, Arches, Bryce Canyon, Grand Canyon, and Grand Teton National Parks were all at one time national monuments. *Id.*

<sup>133</sup> *See id.* (stating that Congress has not taken any steps to abolish the Monument and has actually engaged in measures to further the livelihood of Grand Staircase).

<sup>134</sup> In *Utah Ass'n of Counties*, the court presumed, for the purposes of the defendant's motion to dismiss, that President Clinton exceeded his authority under the Antiquities Act; otherwise, it would not have been necessary for the court to address any ratification arguments. 1999 U.S. Dist. LEXIS 15852, at \*45 n.13. This note, however, presumes that President Clinton did not abuse *his* powers under the Act, but rather that by exercising the Act at all, a president makes use of an abusive power. The ratification arguments will be addressed in this note, because proponents of the Act often rely on these points to prove that Congress, and therefore the public at large, in fact agrees with monument designations under the Antiquities Act.

### 1. *Boundary Adjustment Legislation*

Proponents of the Monument first point to boundary adjustment legislation, which made small adjustments to the borders of Grand Staircase.<sup>135</sup> The Automobile National Heritage Area Act ("the Automobile Act") was passed by the House of Representatives in 1998.<sup>136</sup> The Automobile Act covered issues regarding a Michigan heritage area honoring the Michigan automobile industry.<sup>137</sup> Interestingly, Title II of the Act is entitled "Grand-Staircase-Escalante National Monument;" and in particular, section 201 of Title II is entitled "Boundary Adjustments and Conveyances, Grand Staircase-Escalante National Monument, Utah."<sup>138</sup> This provision provides for the exclusion of certain Utah towns from the Monument's reach.<sup>139</sup> The provision also adds certain regions to the Monument.<sup>140</sup>

Defendants in *Utah Ass'n of Counties* argued that because Congress made adjustments to portions of the Monument, "Congress must have intended to incorporate fully those provisions of Grand Staircase which it left undisturbed in Grand Staircase boundary adjustment legislation."<sup>141</sup> However, nothing in the text of the Automobile Act indicates Congress's approval or disapproval of the Monument as a whole.<sup>142</sup> The Automobile Act does not deal primarily with Grand Staircase—the provision is merely a rider.<sup>143</sup> Thus, the boundary adjustments show little more than Congress's desire to mitigate some of the

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<sup>135</sup> See *Utah Ass'n of Counties*, 1999 U.S. Dist. LEXIS 15852, at \*47; see also Keiter, *supra* note 50, at 532.

<sup>136</sup> H.R. 3910, 105th Cong. (1998). The Automobile National Heritage Area Act was passed by the Senate in 1998 and was signed into law later that year. See Automobile National Heritage Area Act, Pub. L. No. 105-355, 112 Stat. 3247 (1998).

<sup>137</sup> Automobile National Heritage Area Act § 201.

<sup>138</sup> *Id.*

<sup>139</sup> Garfield County towns such as Henrieville Town, Cannonville Town, Tropic Town, and Boulder Town originally fell within the boundaries of the Monument when President Clinton made his designation. The Automobile Act removes these cities from the Monument's control. *Id.*

<sup>140</sup> Automobile National Heritage Area Act title II, section 201(b) adds East Clark Bench in Kane County to the Monument; section 203 provides for a utility corridor along U.S. Route 89 in Kane County on Bureau of Land Management lands between Mount Carmel Junction and Glen Canyon Recreation Area. These additions presumably compensate for the towns excluded from the Monument.

<sup>141</sup> *Utah Ass'n. of Counties v. Clinton*, Nos. 2:97 CV 479, 492, 863, 1999 U.S. Dist. LEXIS 15852, at \*48 (D. Utah Aug. 11, 1999) (quoting Defense Memorandum Supplement at 22).

<sup>142</sup> *Id.* at \*48–49.

<sup>143</sup> The court in *Utah Ass'n of Counties* points out that the modifications only remove certain towns from the Monument that "could not justifiably be part of the Monument to begin with." *Id.* at \*49.

impacts of the Monument; alternatively, supporters of the Automobile Act's Michigan provisions may have had little concern over whether the Utah provisions were even included in the Automobile Act. This act is clearly not indicative of Congress's desire to have a Utah National monument.<sup>144</sup>

## 2. *Utah Schools and Lands Exchange Act*

Proponents of the Monument further argue that Congress's passage of the Utah Schools and Lands Exchange Act serves as additional proof that Congress concurs with President Clinton's decision to create the Monument through proclamation. Under the Utah Enabling Act,<sup>145</sup> the federal government granted the State of Utah sections of each Utah township in a checkerboard fashion.<sup>146</sup> The checkerboard scheme was used to insure that the State would receive lands of value that would then be used to generate funds for Utah Public Schools.<sup>147</sup> The lands, however, were often not profitable because they were sometimes locked within national parks, forests, and reservations.<sup>148</sup> Such state lands also happened to be scattered within the federal lands of Grand Staircase National Monument and were bound to suffer similar diminution in value, given the strict restrictions of the new Monument.<sup>149</sup>

Upon designation of Grand Staircase as a monument, the State of Utah still retained title to its school lands. However, it sought to trade those lands for federal lands outside the Monument, in order to be able to maximize the resources on the

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<sup>144</sup> There were several riders to this bill. While Title II deals, strangely, with Grand Staircase National Monument, Title III deals with another unrelated topic, the Airmen National Historic Site in Alabama, which commemorates African-American members of the United States Military. *See* Pub. L. No. 105-355 § 302(a), 112 Stat. 3247, 3252-53 (1998). Title IV is yet another rider dealing with the Delaware and Lehigh National Heritage Corridor in Pennsylvania which changes the name of the corridor. *See* Pub. L. No. 105-355 § 401, 112 Stat. 3247, 3258 (1998). Title V of the bill involves a hodgepodge of other issues including Blackstone River Valley National Heritage Corridor in Massachusetts and Rhode Island, *see* § 501, the Illinois and Michigan Canal National Heritage Corridor in Illinois, *see* § 502, a national forest and wilderness area in Utah, *see* § 503, the authorization to build an elementary school on land in Merced County, California, *see* § 504, and the list goes on. Congress could not have taken a serious look at the issues surrounding Grand Staircase in this bill containing so many varied issues and affecting states all over the nation. The Automobile Act does not represent acquiescence to President Clinton's proclamation, but rather congressional approval of minor changes made to a series of historic sites and interests throughout the United States.

<sup>145</sup> *See* The Utah Enabling Act, ch. 138, 28 Stat. 107 (1893-1895).

<sup>146</sup> *See* *Utah Ass'n of Counties*, 1999 U.S. Dist. LEXIS 15852, at \*24-25.

<sup>147</sup> *Id.* at \*25.

<sup>148</sup> *Id.* at \*26.

<sup>149</sup> *See id.* at \*27 (stating that 176,699 acres of state land and 24,000 acres of mineral holdings were within Grand Staircase).



land.<sup>150</sup> In 1998 Congress passed the Utah Schools and Lands Exchange Act,<sup>151</sup> giving all state lands within Grand Staircase to the federal government in exchange for federal lands elsewhere in Utah. Proponents of Grand Staircase argue that the passage of this act reveals Congress's ratification of the Monument as a whole.<sup>152</sup> However, the district court held that it was yet another situation where Congress had passed legislation to mitigate the potential harm the Monument would inflict on the Utah State School Trust.<sup>153</sup>

### 3. *Appropriating Funds to Grand Staircase*

The third argument proponents assert is that Congress acquiesced to the Grand Staircase by appropriating money to it.<sup>154</sup> In the two years following the creation of Grand Staircase, 1996 and 1997, the Department of the Interior Appropriations Acts did not provide any funds for the Monument; however, Department of the Interior Appropriations Acts in 1998 and 1999 included appropriations for Grand Staircase.<sup>155</sup> Nevertheless, appropriating funds to the Monument does not equate with acquiescing to its creation.<sup>156</sup> Further, only a small portion of the Appropriations Acts of 1998 and 1999 was dedicated to the Grand Staircase.<sup>157</sup> Therefore, it is likely that Congress passed the Appropriations Acts in 1998 and 1999 not specifically in agreement with the Grand Staircase appropriations, but because, as a whole, the Department of the Interior Appropriations were acceptable. Again, Congress had not expressed any intent to ratify the Monument.

### 4. *Congress's Failure to Amend the Antiquities Act*

Finally, supporters of President Clinton's designation of the Monument cite the wide array of Antiquities Act legislation that Congress has considered but rejected. Since 1996, a variety of bills have been introduced in an attempt to limit

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<sup>150</sup> See *id.* at \*28.

<sup>151</sup> The Utah Schools and Lands Exchange Act of 1998, Pub. L. No. 105-335, 112 Stat. 3139 (1998).

<sup>152</sup> *Utah Ass'n of Counties*, 1999 U.S. Dist. LEXIS 15852, at \*50.

<sup>153</sup> *Id.* at \*51. Senator Hatch claimed "the principal purpose of this bill is . . . to ensure that the President's promise to protect Utah's school children does not ring hollow." 144 CONG. REC. S5789 (daily ed. June 9, 1998) (statement of Sen. Hatch).

<sup>154</sup> See *Utah Ass'n of Counties*, 1999 U.S. Dist. LEXIS 15852, at \*53.

<sup>155</sup> See Department of the Interior and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-83, 111 Stat. 1543 (1997).

<sup>156</sup> Plaintiffs in *Utah Ass'n of Counties*, 1999 U.S. Dist. LEXIS 15852, at \*53, relied on *TVA v. Hill*, 437 U.S. 153, 189 (1978), which held that appropriation of funds for a particular cause does not necessarily translate into acquiescence to the law underlying the cause.

<sup>157</sup> See *Utah Ass'n of Counties*, 1999 U.S. Dist. LEXIS 15852, at \*54.

or alter the president's authority under the Act; none have passed.<sup>158</sup> However, just because Congress has been unable to pass legislation does not indicate a blanket disinterest in passing a bill to limit the use of the Antiquities Act. Failed attempts at passing legislation do not necessarily reveal Congress's desire for such legislation to fail.<sup>159</sup>

The court in *Utah Ass'n of Counties* stated that congressional inaction is only a persuasive indicator of congressional intent where Congress has developed "a prolonged and acute awareness" of an issue.<sup>160</sup> Grand Staircase National Monument is not yet even six years old, and congressional attempts to amend the Antiquities Act are still occurring. It is premature to argue that Congress does not want to alter the Act or the president's use of it. Never has Congress issued any statements or passed any legislation expressly acquiescing to Grand Staircase. One might logically conclude that because many in Congress are still trying to formulate proper and acceptable legislation, the overall congressional consensus is that the Act must be rectified.<sup>161</sup>

## VI. THE EFFECTS OF GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT

"Mining jobs are good jobs, and mining is important to our national economy and to our national security. But we can't have mines everywhere, and we shouldn't have mines that threaten our national treasures."<sup>162</sup> While President Clinton's words at the Monument's proclamation ceremony certainly speak to crucial environmental values, his remarks do not tell the whole story of the Monument's current impacts on the economy and the residents of Utah.<sup>163</sup> The creation of the new monument in Utah has had astounding effects on the lifestyle

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<sup>158</sup> See *id.* at \*56; see also *infra* Part VII.B (discussing proposed legislation to curb presidential power under the Antiquities Act).

<sup>159</sup> See *Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367, 381 n.11 (1969) (stating that "[u]nsuccessful attempts at legislation are not the best guides to legislative intent").

<sup>160</sup> *Utah Ass'n of Counties*, 1999 U.S. Dist. LEXIS 15852, at \*57. The court relies on *Bob Jones University v. United States*, 461 U.S. 574, 598-600 (1983) (stating that a "prolonged and acute" awareness had only developed after thirteen failed attempts to resolve an issue that spanned a twelve year period). It can hardly be said that the Grand Staircase issue has risen to a level of such awareness.

<sup>161</sup> See *Utah Ass'n of Counties*, 1999 U.S. Dist. LEXIS 15852, at \*58.

<sup>162</sup> *Remarks Announcing the Establishment of the Grand Staircase-Escalante National Monument at Grand Canyon National Park, Arizona*, 32 WKLY COMP. PRES. DOC. 1785, 1787 (Sept. 18, 1996) (statement of President Bill Clinton while presenting Proclamation 6920) [hereinafter *Statement of President Clinton*].

<sup>163</sup> Grand Staircase-region residents expressed their concerns in ways similar to Roger Holland, a Kanab, Utah city councilman and mining consultant: "It's un-American to lock these places up. . . . You're taking food out of children's mouths. You're taking away from dad's pocketbook. And we're doing it over and over again across the West." Rogers, *supra* note 36.

and economy of area residents as well as on Utahns as a whole. Utah residents are not unhappy about preserving the environment; on the contrary, they understand that their state is worthy of preservation and have taken measures to assure that proper regions of their state have necessary protection.<sup>164</sup> However, President Clinton's unilateral designation of Grand Staircase as a national monument severely conflicted with many of the uses that national, state, and local governments had planned for the land.<sup>165</sup>

### A. Managing Grand Staircase

Until the creation of Grand Staircase, the National Park Service, or some derivative agency thereof, managed most national monuments. But in creating Grand Staircase National Monument, President Clinton vested the management authority with the Bureau of Land Management ("BLM"), the agency that had managed the land prior to designation.<sup>166</sup> The BLM, an agency within the U.S. Department of the Interior, currently manages 22.9 million acres of public land in Utah.<sup>167</sup> Proclamation 6920 called for the BLM to prepare, within three years of the date of creation, a management plan for Grand Staircase.<sup>168</sup> The management plan, which has since been drafted and approved, allowed for local commentary on how the lands should be managed.<sup>169</sup> However, the ability to give input after creation of the Monument has given many locals little solace as issues inconsistent with the existence of Grand Staircase persist.

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<sup>164</sup> Utah is home to a variety of congressionally-created national parks and recreation areas including Bryce Canyon, Zion, Dixie National Forest, Canyonlands, and Capitol Reef. See THE COMPLETE GUIDE TO AMERICA'S NATIONAL PARKS 347-57 (Nat'l Park Found. ed., 11th ed. 2001) (describing Utah's national parks and certain national monuments and historic sites).

<sup>165</sup> It is important to remember that no land was seized by President Clinton's Grand Staircase Proclamation. The Monument sits upon federally owned land, and thus neither the State of Utah nor the local residents had any legal interest in the land. Rather, the use of the land has now changed, offsetting economic plans for mining and oil drilling on the Monument that would have brought jobs and money both to Utah and its residents.

<sup>166</sup> See Proclamation No. 6920, 3 C.F.R. 64, 67 (1997) (stating that the BLM shall implement the proclamation and manage the Monument).

<sup>167</sup> Utah Bureau of Land Mgmt., *Utah Public Rewards from Public Lands 2000*, at <http://www.blm.gov/nhp/pubs/rewards/2000/utah.htm> (last visited Feb. 17, 2003). BLM manages approximately 261 million acres of public land nationwide, most of which are located in the West. Bureau of Land Mgmt., U.S. Dep't of the Interior, Homepage, at <http://www.blm.gov/nhp/index.htm> (last updated Apr. 14, 2003).

<sup>168</sup> Proclamation No. 6920, 3 C.F.R. 64, 67 (1997).

<sup>169</sup> See U.S. Dep't of the Interior, *The Grand Staircase-Escalante National Monument Approved Management Plan/Record of Decision* (Feb. 2000), at [http://www.ut.blm.gov/monument/Monument\\_Management/Plan/rod\\_introduction.html](http://www.ut.blm.gov/monument/Monument_Management/Plan/rod_introduction.html) (last updated June 8, 2001).

## B. Economic Demise from the Loss of Oil Wells and Coal Mines

Economic controversy turns on the fact that Grand Staircase National Monument sits atop sixty-two billion tons of coal (valued at between \$221 and \$312 billion), 2.6 to 10.5 trillion cubic feet of coal-bed methane (appraised at \$2 to \$17.5 billion), and 270 million barrels of oil (worth anywhere from \$20 million to \$1.08 billion).<sup>170</sup> Others have estimated the value of the coal at over \$1 trillion.<sup>171</sup> Prior to the monument designation, Andalex Resources Corporation (a Dutch coal company), PacifiCorp, Conoco Oil, as well as a variety of other natural resource organizations, held leases for mining and drilling rights on the land and were in the process of working with the Bureau of Land Management to formulate environmental impact statements in order to carry out their proposed mining and drilling exploration plans.<sup>172</sup> At the time of the proclamation, there

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<sup>170</sup> Quigley, *supra* note 21, at 100. Quigley voices the snide remarks of many Utahns toward President Clinton by indicating that Clinton's statement that "we can't have mines everywhere," *see* Statement of President Clinton, *supra* note 162, at 1787, and accompanying text, is indicative of his ignorance toward the precious value of the unique type of coal located within the Kaiparowits Plateau. Quigley, *supra* note 21, at 100. In addition, Quigley argues that President Clinton ignores the "elementary concept that mine locations are based upon the location of the resources, not vice-versa." *Id.*

<sup>171</sup> *See Establishment of the Grand Staircase-Escalante National Monument by President Clinton on September 18, 1996: Oversight Hearing Before the Subcomm. on Nat'l Parks, Forests, and Lands of the House Comm. on Res.*, 105th Cong. 11, 13 (1997) (statement of Sen. Hatch on April 29, 1997) [hereinafter Statement of Sen. Hatch].

<sup>172</sup> *See Clinton Administration "Surprises" Andalex on Utah Coal Project*, COAL WK., Sept. 23, 1996, at 8 (stating that Andalex had been working with the Bureau of Land Management for six years to complete an environmental impact statement that, absent President Clinton's monument designation, would have allowed Andalex to seek permits to build roads, provide water, and construct other necessary resources across Grand Staircase in order to begin mining); James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483, 524 (1999) (revealing that Andalex had spent \$8 million in preparation for the mine when President Clinton made his proclamation); *see also* Halden, *supra* note 18, at 731 (reporting that PacifiCorp, a generator of electrical power immediately sought to trade its leases on the Monument for other unencumbered federal lands upon hearing of the proclamation); Gary C. Bryner, *What Does Grand Staircase-Escalante Mean for Land Protection in the West?: Resource Development and Ecological Protection*, 21 J. LAND RESOURCES & ENVTL. L. 567, 571 (2001) (stating that the Department of the Interior paid PacifiCorp \$5.5 million to relinquish its leases); Brent Israelsen, *A Year Later, Grand Staircase-Escalante Issues Simmer*, SALT LAKE TRIB., Sept. 14, 1997, at A1 (stating that Conoco, immediately after learning about President Clinton's proclamation, "began staking out leases" it held on the Monument and drilling "wildcat wells" on certain portions of the Monument).

In February 1997, Conoco again announced that it would drill two exploratory wells for methane on the Monument; many believe Conoco was bluffing in an effort to coerce the government into preempting the drilling by engaging in a costly buyout of Conoco's lease rights. Wilkinson, *supra* note 52, at 33. The federal government will likely attempt to stop

were eighty-nine oil and gas leases on the Monument, encompassing 137,700 acres.<sup>173</sup> The designation, however, essentially locked up the nation's largest reserve of low-sulfur, environmentally friendly coal, as well as potential oil and gas resources.<sup>174</sup> President Clinton's proclamation, however, did not explicitly terminate any of the coal or oil leases on the Monument,<sup>175</sup> although it did prohibit, in essence, the issuance of any new leases on natural resources.<sup>176</sup> However, the lack of termination is simply illusory. The Monument will so severely restrict the possibility of building roads, much less bringing any motorized equipment onto the land, that even if leaseholders choose to exercise their mining rights, they would not be able to transport mined coal or oil to sell it.<sup>177</sup> In January 1997, Andalex decided its efforts to pursue the mining option

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Conoco from exercising its environmentally destructive drilling rights and may have to engage in buyout negotiations. Jason M. Keith, *The 1998 Utah Schools and Lands Exchange Act: Project BOLD II*, 19 J. LAND RESOURCES & ENVTL. L. 325, 341 (1999); see also Heather May, *Conoco Applies for Permits to Drill Three Wells in Escalante Monument Despite Previous Failure*, SALT LAKE TRIB., June 27, 1998, at D2.

After an unsuccessful attempt to recover oil in December 1997, Conoco applied for permits to drill three additional wells on the Monument. Critics say, "Conoco doesn't smell oil. Conoco smells a hostage situation. . . . Conoco doesn't want to drill oil, they want to drill the federal treasury." *Id.* Currently five Conoco leases have been suspended following negotiations with the Bureau of Land Management; ten leases still remain active. Bryner, *supra*, at 571.

<sup>173</sup> Fried, *supra* note 5, at 490.

<sup>174</sup> See Critics Decry Clinton 'Land Grab', *supra* note 36; see also Maddox, *supra* note 12 (reporting that Utah Senator Robert Bennett claimed that the "designation will lock up the nation's largest reserve of clean, environmentally beneficial coal"); Hebert, *supra* note 36 (quoting Senator Bennett: "he [President Clinton] has locked up billions of tons of the cleanest-burning coal in the United States"); *Utah Delegation Blasts Clinton Move on Monument*, *supra* note 12 (stating that the Monument will prevent the exploitation of America's largest deposit of clean-burning, low-sulfur coal); Jack Williams, *Clinton Rode to West's Rescue*, BOSTON HERALD, July 9, 1999, at 31 (calling the Kaiparowits Plateau the "Saudi Arabia of Coal").

<sup>175</sup> Proclamation 6920 states: "The establishment of this monument is subject to valid existing rights." See Maddox, *supra* note 12. Despite the provisions of the Grand Staircase proclamation, Andalex was permitted to continue drafting the environmental impact statement it had worked on for nearly six years. President Clinton did, however, express his personal desire that Andalex and the other companies would trade their leases for leases on resources elsewhere. Maddox, *supra* note 12.

<sup>176</sup> See Bureau of Land Mgmt.—Grand Staircase-Escalante Nat'l Monument, *Questions and Answers on the Grand Staircase-Escalante National Monument*, at [http://www.ut.blm.gov/monument/Monument\\_Management/Initial%20Planning/questions.html](http://www.ut.blm.gov/monument/Monument_Management/Initial%20Planning/questions.html) (last updated Mar. 13, 2001).

<sup>177</sup> See Halden, *supra* note 18, at 732 (quoting Interior Secretary Babbitt as saying that "Andalex won't lose their right to mine, . . . [t]hey'll just lose the ability to transport the coal out if the government denies the permits to build roads over protected lands."). See generally Keiter, *supra* note 50, at 526 (discussing the limited access of motorized vehicles on the Monument); Wilkinson, *supra* note 52, at 33 (suggesting that environmentalists were concerned that the Andalex mine would produce a "steady stream of 65-ton, 42-wheel tractor-trailer trucks

were futile and withdrew its mine application, which was awaiting approval from the Utah Division of Oil, Gas, and Mining.<sup>178</sup>

The economic disarray left in the wake of President Clinton's invocation of the Antiquities Act is substantial.<sup>179</sup> The foregone economic realization from exploiting the natural resources on Grand Staircase is so immense that it has caused some Utahns to claim President Clinton's designation put their counties "upon the sacrificial altar."<sup>180</sup> Andalex purchased the mining rights on Grand Staircase in the late 1980s and devised a fifty-year plan to extract the coal.<sup>181</sup> Federal tax royalties alone from the mine were estimated at \$6 to \$9 billion, a portion of which would have gone to the state of Utah.<sup>182</sup> Additionally, Andalex estimated it would create 1000 new jobs for the rural community<sup>183</sup> with an annual estimated payroll of \$16.7 million.<sup>184</sup> Utahns will not realize these benefits now that extracting resources from Grand Staircase is no longer a realistic possibility.<sup>185</sup>

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rumbling through the monument"); Keith, *supra* note 172, at 340 (discussing environmental concerns and road hazards behind Andalex's plan to haul 150 loads of coal per day on ninety-foot long trucks from the Smokey Hollow Mine, through Hurricane, Utah, to railroad yards in Cedar City, Utah and Maopa, Nevada).

<sup>178</sup> Rasband, *supra* note 172, at 524-25. After negotiating a land exchange agreement with the Department of the Interior, the federal government ended up paying \$14 million to Andalex to relinquish the Monument leases. See Bryner, *supra* note 172, at 571. Andalex may have been chased off Grand Staircase but has not completely abandoned Utah. In a joint venture with Intermountain Power Agency, Andalex successfully bid on a 1646-acre coal tract in Whitmore Canyon located near East Carbon City. The tract is estimated to contain 14.8 million tons of recoverable coal and will produce an estimated 3 million tons of coal per year. *Id.* The companies will pay an eight percent royalty on all coal mined from the tract, half of which will go to the State of Utah. *Id.*

<sup>179</sup> See Nie, *supra* note 52, at 80 (asserting that the coal mine would produce sales taxes, property taxes, royalty payments, as well as large scale employment that would hopefully "resuscitate a fragile southern Utah economy").

<sup>180</sup> *Establishment of the Grand Staircase-Escalante National Monument by President Clinton on September 18, 1996: Oversight Hearing Before the Subcomm. on Nat'l Parks, Forests, and Lands of the House Comm. on Res.*, 105th Cong. 11-72 (1997) (testimony of Louise Liston, County Commissioner, Garfield County, Utah) [hereinafter Testimony of Louise Liston].

<sup>181</sup> Vulliamy, *supra* note 5, at 20.

<sup>182</sup> See Statement of Sen. Hatch, *supra* note 171, at 13.

<sup>183</sup> Vulliamy, *supra* note 5, at 20. The economic benefit of such a large employer would have been spectacular on Kane County, with its population of only about 6000. *Id.*

<sup>184</sup> See Rasband, *supra* note 172, at 523.

<sup>185</sup> There, of course, has been great dissension among environmentalists who want to protect the land from development and exploitation and area residents who need the land for economic development. A bumper sticker frequently seen on cars in the Grand Staircase area reads, "Are you an environmentalist or do you work for a living?" Nie, *supra* note 52, at 80. Westerners who use the land for economic purposes believe that environmentalists forget that

The loss of mining opportunities came at a time when many Southern Utahns were already suffering from a severe economic depression. Kaibab Industries Lumber Mill, a major employer in the area, began downsizing in 1991.<sup>186</sup> By 1996, Kaibab had completely closed its operations, resulting in the loss of 273 jobs and forcing 470 Kane County residents to migrate elsewhere in search of employment.<sup>187</sup> The remaining jobs provided a median income to the community that was just half the median income provided by Kaibab Industries.<sup>188</sup> The federal government promised that the new Monument would significantly boost the Kane County economy.<sup>189</sup> However, neither Grand Staircase nor any other monument, while following its strict resource preservation policies, has ever contributed significantly to the economic base of the communities in the Monument's vicinity.<sup>190</sup>

### C. (Not) Competing with Indonesian Mines

As if President Clinton's aspirations to be re-elected did not create a questionable enough motive for creating the largest national monument currently in existence, some critics believe that President Clinton had yet another trick up his sleeve in issuing the 1996 proclamation. The low-sulfur coal located in the Monument would have competed directly with similarly clean-burning coal owned by the Lippo Group in Indonesia.<sup>191</sup> The Lippo Group had several long-lasting ties with President Clinton, and interestingly had made a major campaign

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the wood they use for home heating, the water they drink from dammed rivers, and the electricity they enjoy from coal all require the exploitation, to some extent, of Western lands. *Id.*

<sup>186</sup> See Statement of Michael E. Noel, *supra* note 6; see also Ralph Becker, *Defining a Cultural Context*, in VISIONS, *supra* note 5, at 56 (revealing that unemployment in Garfield County is more than three times Utah's average while Kane County's unemployment rate is more than twice that of Utah's average).

<sup>187</sup> Statement of Michael E. Noel, *supra* note 6; see also Dean L. May, *A Human History*, in VISIONS, *supra* note 5, at 47–51 (discussing the sparse population of the Grand Staircase region).

<sup>188</sup> Statement of Michael E. Noel, *supra* note 6. The average annual income of a Kane County family is \$28,000. *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* Noel also comments that after over five years of living with the Monument, the economy in Kane and Garfield Counties has not improved, but in fact has worsened. Promises of increased tourism and other economic developments have not come to fruition. See *infra* Part VI.E (discussing burdens tourism has placed on southern Utah's economy). Further, creating more dissension throughout the community is the fact that the only southern Utah residents who have benefited economically from Grand Staircase are the highly compensated federal employees who were chosen by the federal government to move to the area and manage the Monument. Statement of Michael E. Noel, *supra* note 6.

<sup>191</sup> Jeff A. Taylor, *Utah Land Grab Still a Mystery*, INVESTOR'S BUS. DAILY, Nov. 7, 1997, at A1.

contribution to the Democrats just before the Grand Staircase proclamation.<sup>192</sup> Utah Representative Chris Cannon claimed that high-grade coal mines in Indonesia owned by Lippo would have competed fiercely with the Grand Staircase mine held by Andalex, which contained the same high-grade coal.<sup>193</sup> In fact, to date there are only three sites in the world known to contain this rare, high quality coal: the Kaiparowits Plateau in Grand Staircase, Indonesia, and Colombia.<sup>194</sup> The Colombians, however, are many years away from being able to mine their resources, leaving only Indonesia and Grand Staircase as current sources of this highly desired coal.<sup>195</sup>

Cannon suspected that President Clinton invoked the Antiquities Act to create the Monument, thereby preventing any domestic competition for his major foreign campaign contributors.<sup>196</sup> With this move, President Clinton could seemingly kill two birds with one stone. That is, he could win the votes of environmentalists who would be happy to see the area preserved, and he could continue raising campaign funds from potential mine competitors who wanted Grand Staircase to be designated a national monument in order to secure mining competition in the region.

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<sup>192</sup> For example, videotapes of a White House coffee event show a Lippo donor who gave the Democrats \$425,000 shaking hands with President Clinton. *Id.*

<sup>193</sup> Israelsen, *supra* note 172.

<sup>194</sup> Paul Bedard, *Congress Checks Lippo Link to 'Clean Coal' Closure*, WASH. TIMES, July 24, 1997, at A6.

<sup>195</sup> *Id.*

<sup>196</sup> Israelsen, *supra* note 172; see also Paul Craig Roberts, *Smoking Gun in the Coal Bin*, WASH. TIMES, Dec. 30, 1996, at A14 (quoting Sarah Foster's view that "[w]ith a stroke of his pen [President Clinton] wiped out the only significant competition to Indonesian coal interests in the world market"). But see *Natural Resources Utah Monument: Limbaugh Circulates Coal-Conspiracy Theory*, AM. POL. NETWORK GREENWIRE, Dec. 23, 1996, WESTLAW, 12/23/96 APN-GR 16 (quoting Lee Allison, director of the Utah Geological Survey, as stating that the theory that Grand Staircase extinguishes competition for the Lippo group "makes no sense to our geologists and coal experts" because "[i]f Lippo Group develop[s], they will blow Utah coal out of the water economically"). Although the basis of Allison's reasoning is unclear; other analysts argue that because the coal deposits are so distant from transportation hubs, the mine would not be financially profitable. See, e.g., Glick & Begley, *supra* note 17, at 61.

Reports indicate that because Andalex planned to sell most of its coal to California and the Pacific Rim countries, additional resources would be needed to build and maintain new roads to transport the coal out of Grand Staircase to the requisite transportation hubs. See Nie, *supra* note 52, at 80. Allison's economic suggestions are further explained by the fact that Indonesia's coal production has increased significantly during the 1990s, making it one of the cheapest producers of coal in the world; labor costs are minimal and the coal is extracted via surface strip mining. See Karl Cates, *Fire's Out on Smoky Mine Plan*, DESERET NEWS (Salt Lake City), Dec. 26, 1996, at A1. The Grand Staircase mine proposed by Andalex, however, involved only forty acres of surface mining and the rest beneath the surface. *Id.*



The White House, however, referred to such a charge as “absurd” and “ludicrous.”<sup>197</sup> Congress looked more deeply into the issue, subpoenaing papers to determine whether Lippo was a factor in creating the Monument, but no paper trail indicating such activity ever surfaced.<sup>198</sup> Congress continued its attempts to force the White House to explain its actual motivation behind Grand Staircase, but the Clinton administration refused to comply.<sup>199</sup> After the White House missed its deadline to turn over the subpoenaed papers, The House Natural Resources Committee threatened to charge Kathleen McGinty, head of the Council on Environmental Quality, with contempt of Congress. Consequently, the White House quickly turned over the papers.<sup>200</sup> Links between the White House and the Lippo Group were not discovered; instead Congress learned that President Clinton’s domestic political motivations sparked the Monument.<sup>201</sup>

Whether President Clinton was motivated by the Lippo Group or simply by his own political desires is largely irrelevant at this point. Historical litigation over monuments reveals that a president’s motives are generally inconsequential, as long as his designation falls within the broad language of the Antiquities Act. Still, the *possibility* of corruption indicates the potentially *enormous* powers that can be exercised by a president under the Act. With one swipe of his pen, the president can put an end to mining the largest low-sulfur coal reserve in our nation, thereby affecting not only the domestic economy, but economies abroad as well.<sup>202</sup> And because such power will essentially go unchecked by the courts, Congress, which in this case had its own plans for the land, bears the burden of going back to the drawing board to develop a new plan to determine the fate of the Monument.

#### D. Effects on Ranching

Because such a great proportion of Utah land is owned by the federal government, many ranchers who raise cattle on this sparse terrain rely on the Bureau of Land Management (“BLM”) to issue permits allowing grazing on

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<sup>197</sup> Taylor, *supra* note 191; *see also* Cates, *supra* note 196 (quoting White House spokeswoman Mary Ellen Glynn: “The reason that the monument was created is because it’s an extraordinary place, filled with bird and plant life and natural wonders that needed to be protected. It had nothing to do with Indonesian coal interests.”).

<sup>198</sup> Taylor, *supra* note 191.

<sup>199</sup> *Id.* The White House’s suspicious secrecy regarding the entire incident is likely what continued to fuel Congressional inquiry as to its motives.

<sup>200</sup> *Id.*; *see also* Bedard, *supra* note 194 (stating that hundreds of pages of documents given to congressional investigators revealed no link to Lippo, but rather a political tactic to “woo environmentalists”).

<sup>201</sup> *See* Taylor, *supra* note 191; *see also supra* Part IV.B (revealing the true motivations of Kathleen McGinty and President Clinton in creating the Monument).

<sup>202</sup> *See* Roberts, *supra* note 196.

public lands.<sup>203</sup> Although Proclamation 6920 specifically stated that the creation of Grand Staircase would not diminish existing permits or numbers of livestock grazing on Monument lands,<sup>204</sup> local ranchers have felt an increased burden as the BLM has decided to revoke permits and close the much needed ranges.<sup>205</sup> Many argue that these restrictions are uncalled for and are merely a ploy to bring an end to grazing on Monument lands.<sup>206</sup>

In 2000, the BLM asked permittees to remove their cattle from summer and winter ranges along certain tracts of Monument lands.<sup>207</sup> Due to severe drought, the BLM thought this action appropriate for the long-term viability of the range.<sup>208</sup> A series of wildfires also threatened the health of the lands.<sup>209</sup> While most ranchers complied with the request, others refused, claiming the BLM's action was a "thinly disguised attempt . . . to phase out grazing."<sup>210</sup> When the BLM determined that these defiant ranchers would not or could not remove their cattle, the BLM impounded them.<sup>211</sup> The cattle owners, disgusted with the action, arrived at the livestock auction where the cattle were to be sold, loaded them into trailers, and returned them to their private ranges.<sup>212</sup>

Despite these feuds, ranchers still need a place for their cattle. For example, just one cow and her calf require twenty acres per month to feed, and sufficient land is a rare commodity in many parts of the arid West.<sup>213</sup> At the same time, it is crucial for the BLM to protect the Monument lands. Whether the BLM has legitimately reduced grazing or not, it is apparent that public land use for ranching

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<sup>203</sup> Statement of Michael E. Noel, *supra* note 6 (stating that because only 4.4% of the land in Kane County is privately owned, residents must use public lands to sustain life). For a discussion on conflicts of ranching on public lands, see Julie Andersen, Note, Public Lands Council v. Babbitt: *Herding Ranchers Off Public Land?*, 2000 BYU L. REV. 1273.

<sup>204</sup> Proclamation No. 6920, 3 C.F.R. 64, 67 (1997).

<sup>205</sup> See Statement of Michael E. Noel, *supra* note 6 (pointing out that "[s]evere livestock grazing reductions, restrictive regulations, and access to the land are at the forefront of the current battle").

<sup>206</sup> See *id.*

<sup>207</sup> See Bureau of Land Mgmt.—Grand Staircase-Escalante Nat'l Monument, *BLM Rounds Up Cattle on Fifty Mile Mountain*, at [http://www.ut.blm.gov/monument/Monument\\_Management/News%20Archive/roundup.html](http://www.ut.blm.gov/monument/Monument_Management/News%20Archive/roundup.html) (last updated Mar. 13, 2001) [hereinafter *BLM Rounds Up Cattle*].

<sup>208</sup> *Id.*

<sup>209</sup> Julie Cart, *Amid Drought, a Range War Erupts in Utah over Grazing Restrictions*, L.A. TIMES, Dec. 26, 2000, at A5.

<sup>210</sup> *Id.*

<sup>211</sup> See *BLM Rounds Up Cattle*, *supra* note 207.

<sup>212</sup> See Cart, *supra* note 209. The Sevier County Sheriff was ordered to keep the ranchers from removing the cattle from auction but allowed them to leave anyway to avoid what he called a "Waco Situation." *Id.* The situation became so intense that even the FBI and the U.S. Attorney's Office had to get involved. *Id.*

<sup>213</sup> See *id.*

in the area has been seriously challenged by Proclamation 6920, and the unilateral creation of Grand Staircase has done little to calm the fears of those who desperately rely on public lands for survival.

### E. *Burdens of Increased Tourism*

Southern Utahns have experienced many changes since September 18, 1996. In addition to lost revenues, reports indicate traditional work ethic has been replaced with a lifestyle hindered by federal regulations, restrictions, and threats.<sup>214</sup> Prior to the Monument designation, Garfield County had spent tens of thousands of dollars on developing and implementing a land-use plan.<sup>215</sup> However, the plan soon had to be revamped in the amount of thousands of dollars in order to reflect issues caused by the designation of the Monument.<sup>216</sup> Further, property values have increased five hundred percent since President Clinton designated Grand Staircase a national monument.<sup>217</sup>

Proponents of the Monument have sought to soothe tensions arising from the loss of the mine by emphasizing the prospect of increased tourism to the area.<sup>218</sup> For example, the BLM claims that a population boom in the Southwest will cause an increased demand for tourist locations; the BLM further boasts that its Utah lands had a total economic value of recreation in excess of \$610 million in 1994 alone.<sup>219</sup>

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<sup>214</sup> Louise Liston, *Sustaining Traditional Community Values*, 21 J. LAND RESOURCES & ENVTL. L. 585, 585 (2001).

<sup>215</sup> *Id.* at 587.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* While some may consider the increased property values to be a positive result of the Monument, many local residents view the increases as hindrances to their efforts to obtain additional lands necessary for various projects. *See id.* Additionally, smaller, yet significant, burdens are being placed on area residents as they are forced to deal with increased costs for utilities such as water and sewer, which have been adversely affected by the Monument. *Id.* at 587–88.

<sup>218</sup> *See* Editorial, *Salvation in Utah: President Clinton Invokes Preservation of the Grand Canyon as He Creates a New National Monument of 1.7 Million Acres*, S.F. EXAMINER, Sept. 26, 1996, at C16 (arguing that the “[p]rofit is Utah’s. Tourism is a \$4 billion a year business, the state’s biggest. Tourists won’t flock to a coal mine.”). *But see* Rogers, *supra* note 36 (citing the belief of Garfield County residents that environmentalists “come into town with \$20 and a set of clothes. They leave without changing either.”).

<sup>219</sup> *See* Bureau of Land Mgmt.—Grand Staircase-Escalante Nat’l Monument, *Questions and Answers on the Grand Staircase-Escalante National Monument*, at [http://www.ut.blm.gov/monument/Monument\\_Management/Initial%20Planning/questions.html](http://www.ut.blm.gov/monument/Monument_Management/Initial%20Planning/questions.html) (last updated Mar. 13, 2001). The BLM offers little help to economically-disparaged southern Utah when, on its website, it answers the question: “What will be the impact of the new national monument on the economy of Southern Utah?” The website claims:

Undoubtedly, Grand Staircase-Escalante National Monument will attract visitors and add to Utah's booming tourism industry.<sup>220</sup> But southern Utahns are hardly satisfied with this tradeoff and generally do not find these dollar figures compelling. Minimum-wage jobs in the tourism industry can hardly be reconciled with nearly one thousand high-skilled, high-wage jobs that were supposed to come with the mines and oil wells.<sup>221</sup> Further, southern Utah residents are resentful that Washington, D.C. bureaucrats have forced them into relying on a tourist economy rather than a heavy industry economy.<sup>222</sup> To make matters worse, not only do tourism jobs pay far less than skilled-labor jobs, but they are often seasonal, as tourism declines significantly in the winter months.<sup>223</sup>

Tourism also creates many problems that locals are not interested in confronting. For example, Kanab city councilman and mining consultant Roger Holland claims that tourism "is more trouble than it's worth" and that "[v]isitors

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Designation of the Grand Staircase-Escalante National Monument will bring positive economic benefits to Southern Utah. Millions of people from around the world visit the parks and public lands of the Colorado Plateau each year specifically because the land is beautiful and unspoiled. Public demand for open space continues to grow. Between 1993 and 2006, an increase of 3.36 million new jobs is projected in the Southwest, which will place additional demands on the recreational opportunities afforded by area's [sic] national parks and public lands.

*Id.* This statement does not provide any concrete answers to residents' concerns. Rather, it asserts that while the economy of Southern Utah will suffer, Americans moving to southwestern cities will at least have a nice place to visit in the summer months. Tourism and recreation are important, and should certainly be weighed heavily when considering the protection of public lands, but tourism and recreation do not address the issues important to depressed Southern Utah communities, which also deserve to be given weight.

<sup>220</sup> Utah currently ranks third in the United States in national park visitation. Keith, *supra* note 172, at 339.

<sup>221</sup> *Id.*

<sup>222</sup> See Rogers, *supra* note 36. Ninety-five percent of Kane County is already under public ownership, and the communities are within a ninety-minute drive of Zion, Bryce Canyon, and Grand Canyon National Parks, leaving little room for industrial development. *Id.*; see also Testimony of Louise Liston, *supra* note 180, at 172-73 ("Congressmen and residents in eastern States where Federal ownership seldom exceeds two or three percent cannot begin to comprehend the impacts being placed upon local governments and local economies that rely upon the land for their survival."); BECKER, *supra* note 186, at 56 (stating the presence of Bryce and Glen Canyons caused a decline in traditional employment sectors, altering sources of family incomes); Gail Blattenberger & David Kiefer, *The Economy of the Rural West and the New Monument*, in VISIONS, *supra* note 5, at 61, 67 fig.2 (showing that tourism has increased as a source of income while "extractive" jobs have declined). But see Vulliamy, *supra* note 5, at 20 (quoting Jim Baca, former director of the Bureau of Land Management, as saying "the blue collar jobs that once co-existed with tourism are largely gone. It's hard stuff for people to accept, but their way of life is ending . . . There's no sense in ripping up these last wild areas, no sense at all.").

<sup>223</sup> See Rogers, *supra* note 36.

put pressure on water, sewerage, services.”<sup>224</sup> Garfield County Commissioner Louise Liston is concerned about the increased costs local municipalities incur due to the presence of tourists.<sup>225</sup> Further, such tourists may need emergency services that usually rely on volunteers and are not heavily equipped or staffed.<sup>226</sup> Unfortunately, these services are not funded by tourism, but rather by the meager tax base of the local communities.<sup>227</sup> According to Liston, the current Garfield County tax base is less than \$300,000;<sup>228</sup> had Conoco and other mineral resource companies gone through with their proposed plans, the tax revenues of Garfield and Kane Counties from royalties of the proposed gas mines likely would have exceeded \$1 million per year.<sup>229</sup> Further, due to the rugged and remote nature of the landscape and the often dangerously winding roads that traverse the Monument, unsuspecting visitors frequently need assistance from emergency services in local villages.<sup>230</sup> Such services must be provided on a very meager budget and almost always involve volunteer workers who must take time away from their jobs and families to rescue stranded or injured tourists.<sup>231</sup> Therefore, while high-wage jobs have been eliminated from the community, the towns are becoming increasingly responsible for providing additional costly services to tourists who are now visiting the Monument. Such an immense financial burden to an already economically distraught southern Utah only adds to the hostilities

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<sup>224</sup> Vulliamy, *supra* note 5, at 20.

<sup>225</sup> See Liston, *supra* note 214, at 588 (stating that costly sewer and water upgrades were necessary for the city of Escalante due to the massive influx of tourists visiting the Monument).

<sup>226</sup> See *id.* Liston proposes a scenario in which emergency crews, police officers, and fire trucks may be called to respond to tourists involved in an accident along the Escalante Highway. In the meantime, if a resident of Escalante has a life-threatening need, there may be no additional emergency units to respond. *Id.*

<sup>227</sup> See *id.* (stating that “[t]he services paid for by tax dollars for the benefit of our local communities have been sacrificed to the needs created by the Monument”). Liston puts into perspective the financial burden these communities are experiencing: “How does the county deal with the added burden of garbage collection when a new [garbage] truck costs approximately \$150,000, our tax base generates less than \$300,000 and the federal government will not include garbage collection in the criteria used to receive reimbursement from [federal] impact monies . . . ?” *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> See Testimony of Louise Liston, *supra* note 180.

<sup>230</sup> See Wilkinson, *supra* note 52, at 33 (stating that the region is so remote and rugged that it was the last area of public land in the lower forty-eight states to be mapped and one of the last to be equipped with telephone service). As Monument manager Jerry Meredith described, “[t]he area is extremely remote, complicated to navigate on foot, and during the summer almost unbearably hot. Every year, people die out there.” *Id.*

<sup>231</sup> Testimony of Louise Liston, *supra* note 180.

locals have toward President Clinton's use of the Antiquities Act to create a "surprise" monument in their backyard.<sup>232</sup>

Utahns are also concerned that President Clinton's desire to protect the Grand Staircase region by designating it a monument will not protect the lands as he claims. For over a decade before President Clinton's proclamation, local Utahans and other environmentalists were developing a plan to make part of the Grand Staircase region a wilderness area.<sup>233</sup> Ironically, the Monument will bring millions of visitors along with paved roads, visitor services, facilities, lodging, and restaurants. This will hardly preserve the "untrammelled by man" character of wilderness that President Clinton allegedly held so dear in his proclamation speech.<sup>234</sup> The wilderness proposal pending at the time of the proclamation would have given far better environmental protection to the area that was designated the Grand Staircase region.<sup>235</sup> The Grand Staircase-Escalante National Monument Management Plan attempts to address some of these concerns by limiting visitor development to the outer four percent of the Monument.<sup>236</sup>

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<sup>232</sup> See *Establishment of the Grand Staircase-Escalante National Monument by President Clinton on September 18, 1996: Oversight Hearing Before the Subcomm. on Nat'l Parks and Pub. Lands of the House Comm. on Res.*, 105th Cong. 11, 13 (1997) (statement of Sen. Hatch).

These [issues of increasing water, sewage, garbage, and emergency services] are not trivial matters; they are critical to continuing the livelihood of the cities and towns in the area. So, no one should think that creating a new monument of this size, as endearing a concept as that is, does not create significant problems that must be addressed.

*Id.*

<sup>233</sup> See *supra* Part V.B (discussing Grand Staircase as a proposed wilderness area). See also Hebert, *supra* note 36 (citing Senator Bob Bennett's statement that environmentalists wanted a wilderness area, not a national park).

<sup>234</sup> Hebert, *supra* note 36 (citing Senator Bob Bennett's statement that "[a]s a result of President Clinton's action, the wilderness characteristic 'untrammelled by man' will never be applicable to this area of the state").

<sup>235</sup> See Statement of Sen. Hatch, *supra* note 232.

This wilderness designation would have given greater environmental protection to the scenic Escalante region. Monument status, on the other hand, allows buildings of roads, tourist centers, rest rooms, and eateries. This is the great irony: the stated purpose of the President's proclamation was increased environmental protection. Yet, our wilderness bill would have provided much greater protection to the most scenic and historic areas of the Escalante region. But we were not consulted; we were not asked; nor was our opinion sought.

*Id.* at 13-14.

<sup>236</sup> See Ranchod, *supra* note 50, at 572. Because Grand Staircase is managed by the BLM, and not the National Park Service, the management plan was created in partnership with surrounding communities. Further, the BLM will not provide major lodging, food, or other visitor services, but will instead encourage visitors to view the Monument in its primitive state. *Id.* However, if visitor services are not provided by the BLM, adjacent communities will be forced to provide such services, furthering the concerns these towns have about increased

## VII. THE FUTURE OF THE ANTIQUITIES ACT

The effects of Grand Staircase continue even today. Litigation over the controversial designation persists, despite the futility of litigation regarding similar designations. In July 2001, the Tenth Circuit Court of Appeals handed down a decision allowing environmental organizations and tourism businesses to intervene as parties in *Utah Ass'n of Counties*.<sup>237</sup> It is unclear in what venue and at what pace the case will continue, but the Tenth Circuit has indicated that the litigation is far from over.<sup>238</sup> Meanwhile, the Antiquities Act remains on the books—always at a president's disposal.

One point is clear: the Antiquities Act must be severely amended, or better still, completely abolished. No longer can it effectively serve its original intended purpose to protect certain objects of antiquity and historic or scientific interest. No longer does this country have a lawless, uninhabited West, subject to vandals and homesteaders. Since 1906, Congress has passed a plethora of environmental legislation, allowing for the formation of national parks, recreation areas, preserves, historic sites, and wilderness areas, just to name a few.<sup>239</sup>

What possible purpose could an Antiquities Act legitimately serve today? The answer is none. The Antiquities Act has become completely antiquated. Although it cannot be abused, according to the courts, the Act, in and of itself, is

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tourism. *See id.* But see *Monument Visitor Center Contracts Awarded*, BLM NEWS, Aug. 29, 2001 (on file with author). Two visitor centers will be built, one in Big Water and the other in Cannonville. Monument Manager Kate Cannon stated, "This is a major step in integrating our Monument management activities with the local communities and improving services to residents and visitors." *Id.*

<sup>237</sup> *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246 (10th Cir. 2001). "The intervenors sought leave to represent the interests of public interest organizations and individuals whose goals include protecting the nation's public lands and assuring their continued integrity in perpetuity." *Id.* at 1249. While the intervenors agreed with the position of the defendant government entities, the intervenors did not believe the government's broad spectrum of representational interest adequately represented their particular views. *Id.* at 1256. The Tenth Circuit reversed a district court decision denying intervention. *Id.* In doing so, the court held that the intervenors' motion was timely, *id.* at 1251; the intervenors had sufficient interests in the Grand Staircase National Monument to warrant an intervention, *id.* at 1252–53; the suit would potentially impair the intervenors' ability to protect those interests, *id.* at 1254; and the intervenors' interests were not adequately represented by the government, *id.* at 1256.

<sup>238</sup> *See id.* at 1250–51 (indicating that "the case is far from ready for final disposition" as "no scheduling order has been issued, no trial date set, and no cut-off date for motions set"). In fact, only discovery disputes and motions by defendants seeking dismissal have occurred thus far. *Id.* at 1251.

<sup>239</sup> *See* James R. Rasband, *The Future of the Antiquities Act*, 21 J. LAND RESOURCES & ENVTL. L. 619, 631 (2001) (arguing that the need for the Antiquities Act for use in emergency situations is a "red herring" because the Federal Land Policy Management Act ("FLPMA") contains provisions for emergency withdrawals). *See generally* 43 U.S.C. § 1714 (c), (e); *infra* Part VII.B.8 (discussing FLPMA with more specificity).

an abusive power. It allows a president to unilaterally decide what Congress, the *true* representative of the states, could not or would not decide. Unfortunately, while the legislature ponders how to limit the president's authority under the Act,<sup>240</sup> the executive continues to invoke the Act, making major unilateral changes to the designation of public lands across America—with, or without, public involvement.

### A. George W. Bush Creates a Utah Monument?

Considering the criticism George W. Bush's administration has voiced regarding President Clinton's Grand Staircase designation,<sup>241</sup> many opponents of the liberal use of the Antiquities Act have felt that President Bush would not take advantage of the Act during his term.<sup>242</sup> Not true. Maybe Wes Curtis, Utah's State Planning Coordinator, said it best when he remarked, "[t]he fact remains that this [Antiquities Act] is on the books and it gives the president certain powers, and it has been exercised many times in the past. There's no reason to think it can't happen again."<sup>243</sup> Curtis was absolutely correct. In what has been

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<sup>240</sup> Professor Rasband argues the repeal or amendment of the Antiquities Act has likely been difficult to accomplish because a vast majority of Americans favor the *outcome* of designations, while those concerned about the *procedure* used to create monuments quickly forget their qualms. Rasband, *supra* note 239, at 620. Rasband points out that the West has become a "playground" for many Americans, noting significant increases in visits to public lands over the past half century (National Forest System Lands saw an increase in visits from 27.4 million in 1950 to over 287 million in 1999 while visits to BLM-managed lands skyrocketed from over 31 million in 1972 to more than 65 million in 1999). *Id.*

<sup>241</sup> See *supra* note 50 (indicating the Bush administration's desire to abolish Grand Staircase).

<sup>242</sup> For a discussion on how President George W. Bush is expected to approach the administration of environmental issues, see Mark Udall, *Scaling New Heights or Retreating from Progress: How Will the Environment Fare Under the Administration of President George W. Bush?*, 2000 COLO. J. INT'L ENVTL. L. & POL'Y Y.B. 1. See also Rasband, *supra* note 239, at 624 (theorizing that the Antiquities Act "is unlikely to be put to significant use during a Bush administration").

The Bush administration has, however, transferred key BLM officials who have been more popular with conservationists than with ranchers, miners, and off-road vehicle users. Tom Kenworthy, *Land Agency Accused of Personnel 'Purge'*, USA TODAY, Mar. 11, 2002, at A3. In early 2002, the Department of the Interior directed Kate Cannon, manager of the Grand Staircase-Escalante National Monument, to take a job at either BLM headquarters in Washington or serve as deputy superintendent at Grand Canyon National Park. *Id.* Cannon, who was criticized by locals, as well as by Members of Congress, for her decisions regarding monument management, is now working at the Grand Canyon. *Id.* Similar situations occurred with key BLM officials in Idaho and California. *Id.* While the Bush administration claims this is merely a part of routine rotation of BLM employees, many speculate that the Bush administration is attempting to align public land management with its own environmental ideals. See *id.*

<sup>243</sup> Dan Harrie, *Cannon Blasts Monument Plan*, SALT LAKE TRIB., Feb. 12, 2002, at A1.



considered “déjà vu,” and certainly nothing short of shocking to many Utahns, Utah Republican Governor Mike Leavitt announced in his State of the State address in late January 2002 that he would request that President Bush create a San Rafael national monument on 620,000 acres of Utah land.<sup>244</sup>

The San Rafael Swell, located south of Price, Utah, and west of the Green River in Emery County, contains a rugged band of sandstone cliffs that many pioneers referred to as “reefs” because they rose from the desert floor much like a reef does from the ocean.<sup>245</sup> The area contains wildlife such as wild horses and bighorn sheep.<sup>246</sup> The Swell is also famous because it was frequently used as a hiding place by Butch Cassidy.<sup>247</sup>

The Swell is a popular location for off-road vehicle users who frequently traverse the canyons and landscape.<sup>248</sup> Many environmental leaders are concerned about the damage to the terrain and natural habitat caused by large four-wheel-drive vehicles,<sup>249</sup> and some have even called the Swell “an area crying out for protection from ATVs.”<sup>250</sup> Not surprisingly, members of Congress have sought protection for San Rafael in the past, but nothing has materialized. In 1998, Utah Representative Chris Cannon sponsored a bill to create a national conservation area in the San Rafael area, but his efforts were unsuccessful.<sup>251</sup> Again in 2000, a similar House bill was debated, but it too failed largely because

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<sup>244</sup> *Off-road Enthusiasts Not Happy With Proposed San Rafael Monument*, ASSOCIATED PRESS NEWSWIREs, Feb. 4, 2002, WESTLAW, APWIREsPLUS. Brian Hawthorne, director of Utah Shared Access Alliance, an off-road recreational group, stated that he “was shocked when the governor announced the formalization of the request.” *Id.* But see a statement of Leavitt’s spokesperson, Natalie Gochour indicating that the announcement at the State of the State address was “part of the process” and the governor intends on a thorough process including public involvement before the president makes the designation. *Id.*

<sup>245</sup> *Norton Praises Utah Monument Proposal; Congressman Disagrees*, ASSOCIATED PRESS NEWSWIREs, Feb. 12, 2002, WESTLAW, APWIREsPLUS.

<sup>246</sup> Debora Schoch & Elizabeth Shogren, *National Monument in Utah Proposed Land*, L.A. TIMES, Jan. 29, 2002, at A1.

<sup>247</sup> *Id.* The area, which is almost completely void of any water source, also contains Indian petroglyphs, canyons, and interesting rock formations. C.G. Wallace, *Gov. Wants Utah Land Protected*, AP ONLINE, Jan. 29, 2002, 2002 WL 11685056.

<sup>248</sup> Schoch & Shogren, *supra* note 246.

<sup>249</sup> Eric Pianin, *Bush May Create Monument in Southern Utah*, WASH. POST, Jan. 30, 2002, at A2. Environmental groups expected the Swell to attract many visitors during the 2002 Winter Olympics. Schoch & Shogren, *supra* note 246. In fact, local environmentalists provided information to the Olympic media about Utah wilderness areas, hoping to prompt stories about conservation efforts. *Id.*

Heidi McIntosh, conservation director of Southern Utah Wilderness Alliance, asked: “Will it be a monument to dirt bikes or a monument to the magnificence of the San Rafael Swell?” Donna Kemp Spangler & Lee Davidson, *San Rafael Monument Is Sought*, DESERET NEWS (Salt Lake City), Jan. 29, 2002, at B1.

<sup>250</sup> See *id.* (statement of Heidi McIntosh).

<sup>251</sup> Harrie, *supra* note 243.

Representatives Hansen (of Utah) and Cannon refused to agree to the bill's provisions prohibiting off-road vehicles.<sup>252</sup>

If President Bush creates this monument, he will become a link in a long chain of presidents who have invoked the Antiquities Act, not for emergency purposes to protect objects of antiquity, but to accomplish goals Congress has not been able to achieve.<sup>253</sup> San Rafael Swell National Monument would be nothing more than an attempt to bypass Congress by executively legislating public land management. In this respect, President Bush's actions and motivations would be no different than those of Presidents Clinton, Carter, Franklin D. Roosevelt, or Teddy Roosevelt.

But the Utah state delegation has thoughtfully prepared answers to such concerns. Governor Leavitt (who referred to President Clinton's Grand Staircase as "one of the greatest abuses of executive power in U.S. history")<sup>254</sup> and the Utah congressional delegation (including Senator Hatch)<sup>255</sup> who were all very critical of the Grand Staircase designation, seemingly have no qualms about distinguishing San Rafael from its bigger and badder older brother. While many have been utterly confused by the irony of the situation,<sup>256</sup> Leavitt has claimed that San Rafael is "no stealth proposal," as it would provide for sufficient notice and a request for public commentary before any designation is made.<sup>257</sup> A spokesperson for the Office of the Secretary of the Interior remarked, "'monuments created under this administration will be created the right way,

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<sup>252</sup> Spangler & Davidson, *supra* note 249.

<sup>253</sup> *See id.*

<sup>254</sup> Israelsen, *supra* note 172.

<sup>255</sup> Ironically, in 1997, Senator Hatch, in expressing intense dismay with Grand Staircase, stated: "We cannot have areas like the San Rafael Swell, . . . areas that, in my opinion, are just as deserving, if not more so, than the area contained in the Grand Staircase-Escalante area to be . . . left vulnerable to the whims of any president." Davidson, *supra* note 12.

<sup>256</sup> In a rather satirical comment, Heidi McIntosh, Southern Utah Wilderness Alliance conservation director, wondered if Governor Leavitt had "channeled some of the founding fathers and asked for a clarification" on the intended purpose of the Antiquities Act. Kenworthy, *supra* note 12.

<sup>257</sup> Schoch & Shogren, *supra* note 246. While Leavitt may not consider the proposed monument to be "stealth," his promises of public participation are illusory. Public comment may be collected and considered, but at the end of the day, if President Bush is persuaded that the Swell should become a monument, he can lawfully designate it a monument, regardless of public opposition. Again, the Antiquities Act does not expressly or impliedly require public input and no court in the land is likely to stop President Bush from making a monument designation, popular or unpopular. *See* Brent Israelsen, *Reserve Proposal Touted*, SALT LAKE TRIB., Jan. 30, 2002, at B1 (indicating a fight between the governor and county governments over road usage within the proposed monument might just break the "collaborative effort" Leavitt alleges); *see also* Rasband, *supra* note 239, at 624 (arguing that the Antiquities Act "is likely to remain unamended, aggressively employed, and local participation will remain minimal and largely illusory").

with local community members brought into the process at the beginning.’”<sup>258</sup> Utah officials have been praised by the Bush administration for developing a monument idea that developed from the bottom up, not from the top down.<sup>259</sup> Leavitt has stressed that while President Clinton created Grand Staircase himself in complete secrecy with no public notice or local collaboration, San Rafael was actually proposed by locals and sufficient notice and discussion will ensue before President Bush makes any declaration.<sup>260</sup> Further, Utah officials assert that this proposed monument is legitimate because it is the brainchild of Utahns, not bureaucrats in Washington.<sup>261</sup> Even Senator Orrin Hatch, who spoke quite harshly and frequently about President Clinton’s Utah designation, “supports the designation of a monument because the local people want more protection for the area.”<sup>262</sup>

Not everyone is as pleased with the proposed monument, and not everyone is experiencing the alleged collaborative effort Leavitt has boasted.<sup>263</sup> Some argue that while it is only half the size of Grand Staircase, the proposed monument

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<sup>258</sup> Statement of Mark Pfeifle, spokesman for Secretary of the Interior Gale Norton, *quoted in* Schoch & Shogren, *supra* note 246. It is possible that Pfeifle and the Department of the Interior need a refresher course on the Antiquities Act, for “the right way” in designating monuments does not include public input, which is the center of the controversy around the Act itself (and the bulk of the discussion in this note). Not only does the language rely on the president’s sole discretion, the legislative history reveals that the Act was created to allow the president to quickly protect objects of antiquity, not to hold lengthy public forums on the issue. *See supra* Part II. The Bush administration’s methods for creating monuments may be more popular to the people of Utah, but such methods are certainly no more “right” under the black letter, or the spirit, of the Act. *But see* Harrie, *supra* note 243 (quoting Utah Republican Representative Jim Hansen as saying the plan “follows the letter and the spirit of the Antiquities Act”).

<sup>259</sup> Schoch & Shogren, *supra* note 246.

<sup>260</sup> Spangler & Davidson, *supra* note 249. Leavitt also commented, “I can pretty safely guarantee that if President Bush decides to make the monument declaration in person, he’ll do it in Utah, not Arizona.” *Id.* Leavitt additionally stated, “We’re going to do this by process and not ambush.” Israelsen, *supra* note 257. Further, Representative Hansen referred to the San Rafael proposal as “a prototype for how national monuments should be created.” *A Proposal to Create a 620,000-Acre National Monument in Utah*, INSIDE ENERGY WITH FED. LANDS, Feb. 4, 2002, at 17, 2002 WL 10515073 [hereinafter *Proposal to Create National Monument*].

<sup>261</sup> Wallace, *supra* note 247.

<sup>262</sup> Schoch & Shogren, *supra* note 246.

<sup>263</sup> Brian Hawthorne opposes the prospective monument. “It seems to me the governor is so eager to prove that monuments can be done right with this process. He forgot to ask if he should.” Donna Kemp Spangler, *ATV Group Seeks Delay on San Rafael Monument*, DESERET NEWS (Salt Lake City), Feb. 4, 2002, at B3.

would still be quite formidable.<sup>264</sup> In fact, it would be larger than the combined land mass of Salt Lake and Davis Counties in Utah.<sup>265</sup>

Representative Cannon believes that such a designation would be just as much of an abuse of the Antiquities Act as President Clinton's designation.<sup>266</sup> Cannon, whose district encompasses San Rafael, does not believe a president can legitimately designate a monument of more than 50,000 acres; therefore, San Rafael should be protected legislatively.<sup>267</sup> Cannon admitted that he supports protection of the Swell, but argued that "process is more important than outcome."<sup>268</sup>

Off-road vehicle users are concerned their voices are not being heard in the matter as well.<sup>269</sup> Brian Hawthorne, director of the Utah Shared Access Alliance ("USA-ALL"), argues the monument proposal is "no less an abuse of the letter and intent of the law than when President Clinton stood at the rim of the Grand Canyon on that fateful day."<sup>270</sup> Hawthorne is concerned that environmentalists and USA-ALL were not notified of a recent meeting Governor Leavitt had with local officials and residents in the San Rafael area.<sup>271</sup> Further, environmental groups have already sued the BLM to force it to reduce the amount of off-road vehicle traffic in the Swell; with the BLM likely to manage a proposed monument, further vehicle restrictions are likely to ensue.<sup>272</sup>

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<sup>264</sup> Israelsen, *supra* note 257. The 620,000 acres proposed for San Rafael would result in a national monument larger than many national monuments created in the past. *See generally*, *Listing of Presidentially Designated Monuments*, *supra* note 38.

<sup>265</sup> Israelsen, *supra* note 257.

<sup>266</sup> Harrie, *supra* note 243. Cannon stated, "I've been pretty clear on what I think the law is. The law is that you can only name a monument large enough to protect the scientific and historical objects—and that is small." *Id.* The judiciary, however, as this note shows, does not agree with Cannon on what the law is.

<sup>267</sup> Accordingly, Representative Cannon supported legislation introduced by Representative Hansen, which would have limited designations made under the Antiquities Act to 50,000 acres. *Id.*; *see also infra* Part VII.B.3.

<sup>268</sup> Harrie, *supra* note 243. Cannon added, "I'd rather see the process be appropriate." *Id.*

<sup>269</sup> It is unclear at this point to what extent off-road vehicle use would be permitted within the proposed monument. While Leavitt's proposal specifically limits mining and timber cutting, he decided to leave the off-road vehicle decision to the BLM, which would undoubtedly continue managing the Swell even after the monument designation occurred. *See Kenworthy, supra* note 12. Additionally, it has been reported that the proposed plan will allow multiple uses of the land, such as grazing. *Proposal to Create National Monument, supra* note 260, at 17.

<sup>270</sup> Brent Israelsen, *Recreation Off-Roaders Leery of Leavitt's Monument Plan*, SALT LAKE TRIB., Feb. 2, 2002, at B4.

<sup>271</sup> *Id.* Hawthorne stated: "We and [environmentalist groups] are major users of the San Rafael. We all should be brought to the table." *Id.* (alteration in original).

<sup>272</sup> *See* Israelsen, *supra* note 257.

The Utah School and Institutional Trust Lands Administration ("the Trust Administration") is concerned about school trust lands within San Rafael.<sup>273</sup> The Trust Administration currently manages 100,000 acres of school trust lands within the proposed boundaries, and should a monument be created, a swift effort must be made to exchange those lands for other lands outside the monument.<sup>274</sup> Since 1999, school trust lands have been exchanged for other lands twice, once in 2001 for more consolidated and profitable lands, and once in 1999, during the enormous exchange of Grand Staircase lands.<sup>275</sup>

In anticipation of the pending monument, Governor Leavitt announced in June, 2002 that the State of Utah had negotiated a land trade with the federal government, whereby Utah would trade 108,000 acres of school trust lands within the proposed San Rafael Monument for 135,000 acres of federal lands throughout Utah.<sup>276</sup> Representative Chris Cannon, the lead sponsor of the bill to push the exchange through, quickly found himself with opposition, when Democrats brought the process to a halt in July, 2002, claiming the proposed exchange would result in a windfall for Utah.<sup>277</sup> Although land evaluators of the BLM's Exchange Team urged that the deal was approximately fair, valuing state land at \$35.5 million and federal land at \$35.7 million,<sup>278</sup> internal complaints from the BLM argue that the land valuation was inaccurate, resulting in a gross benefit for the State of Utah between \$97 million and \$117 million.<sup>279</sup> Senior BLM officials claim that the discrepancy rests partly in the appraiser's failure to include potentially recoverable oil shale deposits on the federally-owned tracks of land.<sup>280</sup>

While the U.S. Office of Special Counsel and Interior Secretary Gale A. Norton investigated the allegedly faulted appraisals,<sup>281</sup> Utah Representative Jim Hansen was still able to get the Federal-Utah State Trust Lands Consolidation Act—the bill to swap the lands—past the House in October, 2002.<sup>282</sup> Despite victory in the House, the bill has not yet passed in the Senate.<sup>283</sup>

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<sup>273</sup> See Twila Van Leer, *Monument Plan 'Not Swell'*, DESERET NEWS (Salt Lake City), Feb. 2, 2002, at B2.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> Donna Kemp Spangler, *State Clears Rafael Hurdle*, DESERET NEWS (Salt Lake City), June 19, 2002, at A1.

<sup>277</sup> Lee Davidson, *Utah-U.S. Land Swap Runs into Roadblock*, DESERET NEWS (Salt Lake City), July 25, 2002, at A1.

<sup>278</sup> Robert Gehrke, *Interior Department Says Mineral Rights Undervalued in Proposed Utah Land Swap*, ABERDEEN AM. NEWS, July 20, 2002, at 6.

<sup>279</sup> *Norton Ordered to Probe Utah Land Swap*, WASH. POST, Oct. 1, 2002, at A2.

<sup>280</sup> John Heilprin, *Controversial Land Swap in Utah Nears Completion*, SAN DIEGO UNION-TRIB., Oct. 2, 2002, at A6.

<sup>281</sup> *Norton Ordered to Probe Utah Land Swap*, *supra* note 279.

<sup>282</sup> H.R. 4968, 107th Cong. (2002). Hansen was able to succeed by bringing the bill to the floor, and to a vote, while California Representative George Miller, a key opponent, was not

Early speculations indicated that President Bush would designate the San Rafael Swell National Monument. Governor Leavitt remarked that "the President will like this."<sup>284</sup> The Secretary of the Interior's office has also indicated that President Bush favors the monument proposal.<sup>285</sup> Further, Leavitt personally discussed the proposal with Vice President Cheney.<sup>286</sup>

In November, 2002, Emery County placed a petition on the ballot to ask Emery County residents whether the County Commission should pass a resolution endorsing the proposal to create a national monument at the San Rafael Swell.<sup>287</sup> However, 53.3% of Emery County voters *rejected* the proposal that the Commission formally endorse the monument.<sup>288</sup> Prior to the election, Interior Secretary Norton, whose office is drafting the monument proposal to President Bush, promised that a "no vote" in Emery County would result in her office "re-evaluating the proposal."<sup>289</sup> The reality of the Emery County vote has yet to be seen, especially since the failure of the voters to support the resolution does not legally force county commissioners to end their support for the monument, nor does it prohibit President Bush from declaring the monument.<sup>290</sup>

While Governor Leavitt's "bottom-up" approach seemed to be legitimate earlier in the San Rafael Monument process, the public's voice at the polls seems to have removed any "bottom" support for President Bush's monument. Although the "bottom" portion of the equation is apparently not present in this process, the "up" still is, leaving the future of San Rafael in the hands of the president. A national monument designation only requires a *unilateral* act based on the sole discretion of the president. Public support, while potentially being politically helpful, is unnecessary. Given that conflicting views are surfacing on what should be done with the land, litigation will inevitably result from any designation. However, Antiquities Act litigation has proven useless, leaving Utahans stuck with a monument despite their preferences. For this reason it is crucial that any

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present. Lee Davidson, *Swiftly Hansen Pulls a Fast One on Lands Bill*, DESERET NEWS (Salt Lake City), Oct. 9, 2002, at A17.

<sup>283</sup> S. 2745, 107th Cong. (2002).

<sup>284</sup> Schoch & Shogren, *supra* note 246.

<sup>285</sup> *See id.*

<sup>286</sup> Israelsen, *supra* note 257.

<sup>287</sup> Brent Israelsen, *San Rafael OHV Users Fear Monument*, SALT LAKE TRIB., Sept. 29, 2002, at B1.

<sup>288</sup> Donna Kemp Spangler, *Utah Gov. Mike Leavitt Has Lost His First Election*, DESERET NEWS (Salt Lake City), Nov. 6, 2002, at A11.

<sup>289</sup> Israelsen, *supra* note 287.

<sup>290</sup> Electa Draper, *Utah Monument 53 Percent Vote Against Protecting Historic Land*, DENVER POST, Nov. 7, 2002, at A16. Emery County Commissioner Drew Sitterud said of the no-vote: "It's not legally binding on us. As far as morally binding, I don't know how we could go on without voter support." *Id.* President Bush is free, of course, to designate the monument even without the blessing of Emery County Commissioners.

protection for the Swell come congressionally. If President Bush attempts to sidestep Congress and designate a monument, he too will invoke the abusive powers allowed under the Antiquities Act, and he likely will deserve as much disapproval as President Clinton received.

### *B. Amending and Working Around the Antiquities Act*

Since President Clinton's 1996 designation of Grand Staircase, proposed legislation to amend the Antiquities Act has increased greatly. Although no legislation has passed, and most of the legislation has failed or been stalled indefinitely in committees, there is still hope for meaningful alterations to the Act. Because the Act is completely antiquated, abolishing it is the most appropriate option. However, abolition is unlikely to occur absent a two-thirds majority of Congress supporting it.<sup>291</sup> Whether or not he intends to use the Antiquities Act during his term, any president would undoubtedly not look favorably upon legislation limiting his own discretionary power.<sup>292</sup> However, the possibility still exists that if Congress could time its legislation properly, a president might sign it to prevent an incoming president from making use of it. Until such a tactic can be concocted, severe amendments are needed that will, in effect, completely diminish any meaningful power the president has under the Antiquities Act.

#### *1. House Bill 4118 (104th Congress)*

On September 19, 1996, the day following President Clinton's surprise designation of Grand Staircase as a national monument, Utah Representative Jim Hansen introduced House Bill 4118. Its purpose was to "amend the Antiquities Act to limit the authority of the President to designate areas in excess of 5,000 acres as national monuments."<sup>293</sup> Interestingly, the proposed legislation was

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<sup>291</sup> It is often difficult to rally support for amendments to the Antiquities Act because the federal lands it generally affects are primarily found in western states like Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. Quigley, *supra* note 21, at 96 n.307. Therefore, congressional delegations of these western states have the difficult task of garnering the support of the eastern delegation, whose states are not directly impacted by use of the Act and who are generally more interested in environmental protection and recreational uses of western lands. *See id.* at 96.

<sup>292</sup> Even President Bush, who made scathing remarks about President Clinton's use of the Act, seems to have found an appropriate use for the century-old legislation. Why would President Bush sign legislation abolishing his broad discretionary powers under the Act when he is about to invoke it to make many of his constituents very happy? *See id.* at 95-96 (arguing that it is "highly doubtful" that any president would agree to a bill that limited or revoked his power under the Antiquities Act).

<sup>293</sup> H.R. 4118, 104th Cong. § 1 (1996). Hansen also proposed adding the following sentence to the end of the Antiquities Act: "The President may not exercise the authority of this section to declare any area in excess of 5,000 acres to be a national monument." *Id.*

retrospective, taking effect over any designation made after January 1, 1996.<sup>294</sup> This would presumably abolish Grand Staircase National Monument and effectively prevent any creation of future monuments of substantive size. The bill was referred to the House Committee on Resources on September 19, 1996, but died after being referred to the Subcommittee on National Parks, Forests and Lands.<sup>295</sup>

## 2. *House Bill 4214 (104th Congress)*

On September 26, 1996, just days after the Grand Staircase designation, Utah Representative William Orton introduced House Bill 4214 “[t]o amend the Antiquities Act to provide for the Congressional approval of the establishment of national monuments.”<sup>296</sup> The proposed legislation would have required Congress to review any presidential proclamation under the Antiquities Act and to approve of it within 180 days of the designation.<sup>297</sup> If Congress did not approve of the president’s action, the proclamation, and thus the newly created monument, would cease to exist.<sup>298</sup> The proposed legislation was a clear attempt to bar the president from making unpopular designations and to prevent monuments that Congress opposed. Unfortunately, the bill died when it did not receive a rule from the Rules Committee.<sup>299</sup> Orton was unable to suggest further amendments to the Act, as he lost his congressional seat to Chris Cannon in the November 1996 election.<sup>300</sup>

## 3. *National Monument Fairness Act of 1997 (105th Congress)*

Representative Hansen tried again to amend the Antiquities Act in March 1997 by introducing House Bill 1127, the National Monument Fairness Act of 1997.<sup>301</sup> Instead of limiting national monument designations to 5,000 acres, as House Bill 4118 did, the National Monument Fairness Act sought to restrict the president’s power to issue a proclamation creating a monument larger than 50,000

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<sup>294</sup> *Id.* § 2.

<sup>295</sup> See Thomas, The Library of Cong., *Bill Summary & Status for the 104th Congress: H.R. 4118*, at <http://thomas.loc.gov/bss/d104query.html>, Bill search term: “hr4118” (last visited Apr. 14, 2003) (indicating last major action was referral to the House subcommittee on National Parks, Forests, and Lands).

<sup>296</sup> H.R. 4214, 104th Cong. (1996).

<sup>297</sup> See *id.* § 2.

<sup>298</sup> *Id.*

<sup>299</sup> See Thomas, The Library of Cong., *Bill Summary & Status for the 104th Congress: H.R. 4214*, at <http://thomas.loc.gov/bss/d104query.html>, Bill search term: “hr4214” (last visited Apr. 14, 2003) (indicating last major action was referral to the Committee on Rules).

<sup>300</sup> Quigley, *supra* note 21, at 93.

<sup>301</sup> H.R. 1127, 105th Cong. (1997).



acres in any one state in a given calendar year.<sup>302</sup> Further, the bill proposed that the president would be required to send the governor of the affected state the monument proposal at least thirty days prior to making the designation.<sup>303</sup> Finally, the bill would have required upon congressional approval, through a joint resolution that either the monument become designated within two years or be abolished automatically.<sup>304</sup> This bill died in the Committee on Energy and Natural Resources in early 1998.<sup>305</sup>

Simultaneously with Representative Hansen's introduction in the House, Senator Orrin Hatch introduced Senate Bill 477 under the same title. The Senate bill differed slightly in that it restricted the monument size to 5,000 acres unless the governor of the monument's home state submitted comments within ninety days and Congress subsequently approved of the proclamation.<sup>306</sup> However, no time limit was given for Congress to approve the monument designation, yet like the House bill, the Senate bill died in 1998.<sup>307</sup>

#### 4. *Public Land Management Participation Act of 1997 (105th Congress)*

In May 1997, Alaskan Senator Frank Murkowski introduced Senate Bill 691, the Public Land Management Participation Act of 1997.<sup>308</sup> The Act's purpose was to require the Secretary of the Interior and the Secretary of Agriculture to collect information regarding public opinion and to establish procedures that would give the public as well as federal, state, and local governments appropriate notice and a forum to voice concerns about plans to declare national monuments on federally owned or controlled lands.<sup>309</sup> Further, the bill would have forced the president to comply with all federal land management and environmental statutes, including the National Environmental Policy Act.<sup>310</sup> The bill also would have required the secretaries of Interior and Agriculture to collect public commentary and then to make a recommendation to the president regarding which federal

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<sup>302</sup> See *id.* § 2.

<sup>303</sup> See *id.*

<sup>304</sup> See *id.*

<sup>305</sup> See Thomas, The Library of Cong., *Bill Summary & Status for the 105th Congress: H.R. 1127*, at <http://thomas.loc.gov/bss/d105query.html>, Bill search term: "hr1127" (last visited Apr. 14, 2003) (indicating last major action was request for executive comment from the Department of the Interior and the Office of Management and Budget).

<sup>306</sup> S. 477, 105th Cong. (1997).

<sup>307</sup> See Thomas, The Library of Cong., *Bill Summary & Status for the 105th Congress: S. 477*, at <http://thomas.loc.gov/bss/d105query.html>, Bill search term: "s447" (last visited Apr. 14, 2003) (indicating last major action was request for executive comment from the Department of the Interior and the Office of Management and Budget).

<sup>308</sup> S. 691, 105th Cong. (1997).

<sup>309</sup> *Id.* § 3.

<sup>310</sup> *Id.*

lands actually warranted inclusion in a national monument.<sup>311</sup> This bill would have, in effect, dismantled the Antiquities Act while still allowing it to remain on the books. Like its predecessors, it too died in committee.<sup>312</sup>

### 5. *National Monument NEPA Compliance Act (106th Congress)*

In yet another effort to thwart the Antiquities Act, Representative Hansen introduced the National Monument NEPA Compliance Act in April 1999.<sup>313</sup> Like many previous bills, the bill proposed that the president solicit public participation and comment, as well as consult with the requisite state government prior to making a monument designation.<sup>314</sup> The bill did not, however, limit the size of the proposed monument. Instead, it required the management plans for the monument to comply with the National Environmental Policy Act, which would have forced the management committee to file the requisite environmental impact statements.<sup>315</sup>

Although this proposal would have furthered the goal of soliciting public commentary, it did not state that the president would have to make his decision based on that commentary. Thus, requiring solicitation of commentary would be largely illusory. Further, it was more important that the requirements of NEPA be followed *before* the monument was created, ensuring that the proper lands were being protected, rather than following the requirements *after* designation, when the only remaining issue was how to protect the lands already set aside.

Had this bill been in effect when President Clinton was pondering Grand Staircase, the same result likely would have occurred. President Clinton presumably would have gathered public commentary, warned the Utah delegation, and then gone ahead with his plan, irrespective of Utah's opinion. Additionally, the Grand Staircase management team, not President Clinton, would have been left to comply with NEPA. Not surprisingly, because this bill was the weakest of all previous proposals it advanced the furthest, passing the House in September 1999 and being placed on the Senate calendar.<sup>316</sup>

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<sup>311</sup> *Id.*

<sup>312</sup> See Thomas, The Library of Cong., *Bill Summary & Status for the 105th Congress: S. 691*, at <http://thomas.loc.gov/bss/d105query.html>, Bill search term: "s691" (last visited Apr. 14, 2003) (indicating last major action was request for executive comment from the Department of the Interior and the Office of Management and Budget).

<sup>313</sup> H.R. 1487, 106th Cong. (1999).

<sup>314</sup> *Id.* § 1.

<sup>315</sup> See *id.*

<sup>316</sup> 146 CONG. REC. S1815 (2000).

### 6. *National Monument Fairness Act of 2001 (107th Congress)*

In June 2001, Idaho Representative Mike Simpson introduced House Bill 2114, which largely paralleled the National Monument Fairness Act of 1997.<sup>317</sup> House Bill 2114 limits the size of any monument to 50,000 acres and includes a proscription on adding more than 50,000 acres to an existing monument unless Congress approves the designation within two years.<sup>318</sup> If passed, the Act would also require the president to give the governor and congressional delegation of the affected state sixty days notice and to provide the governor with a copy of the proclamation at least thirty days prior to a monument's designation.<sup>319</sup> The president would also be required to solicit public comment, but as in the National Monument NEPA Compliance Act, there is no requirement that the president actually consider this information in his designation.<sup>320</sup>

This proposal, like its 1997 predecessor, only provides for temporary monuments unless Congress acquiesces. What makes this bill particularly effective is that although the president would not be required to adhere to public commentary, he might be more likely to incorporate such comment in his decision for fear that Congress will withhold its necessary approval. While leaving the Antiquities Act in place, this bill disassembles some of the most threatening components of the Act, as Congress, representing the several states, must affirmatively act to maintain the monument's existence. This bill passed out of committee and was reported to the full House in April, 2002.<sup>321</sup>

### 7. *House Bill 193 (105th Congress)*

Some proposed legislation has taken a slightly different approach to avoiding the wrath of the Antiquities Act. In 1997, California Representative Wally Herger introduced an amendment to the National Historic Preservation Act.<sup>322</sup> In general, the bill sought to prohibit the inclusion of certain sites on the National Historic Register from the National Historic Preservation Act.<sup>323</sup> However, more interestingly, the bill would have specifically prohibited Mount Shasta in California from being designated a historic district, historic site, or a national monument under the Antiquities Act.<sup>324</sup> Rather than attempting to amend and

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<sup>317</sup> H.R. 2114, 107th Cong. (2001).

<sup>318</sup> *Id.* § 2.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> 148 CONG. REC. H1288 (2002).

<sup>322</sup> H.R. 193, 105th Cong. (1997).

<sup>323</sup> *See id.* § 1.

<sup>324</sup> *Id.* § 2.

limit the use of the Antiquities Act in general, this bill aimed specifically to exclude particular sites from potential monument designation.<sup>325</sup>

Although this bill stalled in committee in 1997, a similar tactic, specific to a certain region or location, might be more successful than an actual amendment to the Antiquities Act. Many members of Congress may be hesitant to agree to a blanket amendment severely limiting the use of the Antiquities Act throughout the country, as they have broader concerns about overall environmental protection. Thus, environmentally conscious members of Congress may view a bill allowing specific land exclusions as a means to allow continued use of recreation areas *their* constituents enjoy.

Members of Congress likely have less of a stake in allowing certain regions to be specifically excluded from the purview of the Antiquities Act. Thus, a member of Congress might argue that while Mount Shasta cannot be protected under the Antiquities Act, there are still plenty of other federal lands subject to protection; the face of the Antiquities Act is less diminished this way, and members of Congress with an overall environmentally friendly agenda will feel like they have less to lose with such a proposal. Members of Congress from western states, who are concerned about the potential use of the Act in their state, might consider introducing legislation to remove only particular pieces of land from the reach of the Antiquities Act. This might be particularly effective at times when Congress already has begun efforts to protect those lands. That is, members of Congress could argue that when congressional efforts are underway to adequately protect certain lands, the president's interference by creating a monument will only complicate issues and render futile the hard work of Congress.

This sort of tactic could have been used prior to the Grand Staircase designation when Congress was debating wilderness proposals. Although the realization of legislation exempting an area from the Antiquities Act would take time, one must remember that the congressional planning of Grand Staircase wilderness areas took place over more than a decade. Had steps been taken early in the process to remove it from designation under the Antiquities Act, President Clinton's proclamation may never have occurred, and the land would have been protected as Congress saw fit.

### *8. Emphasizing Other Environmental Protection Legislation*

Because many members of Congress are apparently hesitant to acquiesce to Antiquities Act amendments due to broad environmental protection concerns, it is important that floor statements, debates, and hearings on proposed legislation

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<sup>325</sup> This is analogous to subsequent congressional legislation regarding Wyoming and Alaska national monuments. *See supra* Parts IV.B, .D.

stress other existing environmental protection laws that can preserve the same lands and objects the Antiquities Act might be used to protect.

One legitimate concern about amending or abolishing the Antiquities Act is that the Act allows for emergency withdrawals by the president of lands that cannot sustain a lengthy wait while Congress decides what lands it will protect and how to protect them. However, the Federal Land Policy and Management Act of 1976 ("FLPMA") alleviates many of those concerns.<sup>326</sup> While the FLPMA does not allow for withdrawals by the president, it does permit the Secretary of the Interior to make emergency withdrawals of land where "extraordinary measures must be taken to preserve values that would otherwise be lost."<sup>327</sup> The emergency withdrawals remain effective for up to three years and cannot be overturned by Congress.<sup>328</sup> Clearly, the FLPMA supercedes the Antiquities Act in its attempt to secure emergency protection for lands in need of preservation, but it does not completely remove the democratic process of determining the fate of those lands; after three years, Congress can decide what it wants to do with the land, making decisions based on the opinion of the populace.

Some, however, are concerned that Congress is unable to efficiently protect land due to political maneuvers in the legislature, and therefore, that the president should have legitimate power to bypass the lawmaking bodies.<sup>329</sup> However, the FLPMA permits the Secretary of the Interior to withdraw lands for a period of twenty years, although Congress has ninety days to pass a resolution striking down the withdrawal.<sup>330</sup> This provision clearly gives abundant power to the executive to make major land withdrawal decisions. It also allows Congress, representing the several states, a sufficient forum to voice concerns and to abolish an executive department withdrawal if Congress determines the withdrawal is not warranted. Such a provision restores the democratic ideals and the separation of powers in making major decisions regarding the use of public lands.<sup>331</sup>

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<sup>326</sup> Codified at 43 U.S.C. §§ 1701–1784, the FLPMA abolished homesteading on federal lands and instituted a national policy to retain public lands in federal ownership.

<sup>327</sup> 43 U.S.C. § 1714(e).

<sup>328</sup> *See id.*

<sup>329</sup> *See* Rasband, *supra* note 239, at 631 (stating "the majority's will is thwarted by sharp legislative maneuvering, particularly the ability of long-standing committee chairmen . . . to bottle-up protective legislation in committee"). Recent bills discussed *supra* clearly exhibit this reality that bills are often killed in committee.

<sup>330</sup> 43 U.S.C. § 1714(c)(1).

<sup>331</sup> This primary purpose of the FLPMA is stated in 43 U.S.C. § 1701(a)(4): "The Congress declares that it is the policy of the United States that . . . the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands . . . and that Congress delineate the extent to which the Executive may withdraw lands without legislative action." (emphasis added).

### VIII. CONCLUSION

Grand Staircase-Escalante is a remarkable piece of landscape unlike any other in our nation. Nearly untrammeled by man, it offers unbelievable scenery, geologic formations, and opportunities for scientific study that cannot be found elsewhere. Undoubtedly, it deserves great care through environmental protection. However, the Antiquities Act is not the method to accomplish such a goal. Our country is built on a system that collects, evaluates, and settles disputes between conflicting goals and interests. The federal government is comprised of the several states, and Congress represents the people of those states.

While preservationists, environmentalists, and vacationers have a valid interest in ensuring that public lands receive the strictest protection, states often need those lands for resources, ranching, farming, and building and sustaining an economy. Further, in their daily lives, all Americans rely on public land resources. Where would we be without coal to produce electricity, water to feed the cattle that produce our meat, and timber to build homes and to make paper? It certainly cannot be said that these interests always, or even usually, outweigh environmental concerns. However, both interests are legitimate, and they need to be carefully weighed.

The Antiquities Act is antiquated because it only takes into account the president's interests. Grand Staircase-Escalante National Monument has broken the camel's back. It is now time—before further improper action occurs—to take serious measures to restore public land management to the public's hands.